Supreme Court, U.S.
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No.

IN THE

Supreme Court of the United States

ROBERT P. LARGESS, *et al.*,
Petitioners.

v.

SUPREME JUDICIAL COURT FOR THE STATE OF MASSACHUSETTS, *et al.*,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the First Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether Article IV, §4 of the United States Constitution (the "Guarantee Clause") is justiciable and under what circumstances will such a claim be justiciable.

2. Whether citizens and taxpayers of a state have standing to bring a Guarantee Clause challenge when their state supreme court improperly amends the state constitution through judicial decision in violation of the clearly confined role of the court under the state constitution.

3. Whether the Guarantee Clause is violated when a state supreme court oversteps the confines of its clearly established role in the state constitution and improperly amends the state constitution through a judicial decision.

4. Whether the Guarantee Clause is violated when a state supreme court oversteps the boundaries imposed upon it by the state constitution and decides a case resulting in an improper "amendment" of the state constitution.

5. Whether the Guarantee Clause is violated when the Massachusetts Supreme Judicial Court reformulates the definition of marriage under state law where the meaning of marriage in the state constitution is undisputed and where the state constitution uniquely restricts the judiciary from reformulating the meaning of marriage.

PARTIES

The Petitioners consist of Robert Largess, a Massachusetts citizen and voter, and eleven Massachusetts Legislators including Rep. Elizabeth A. Poirier, Rep. John A. Lepper, Rep. Edward G. Connolly, Rep. Christopher P. Asselin, Sen. Steven G. Panagiotakos, Rep. Philip Travis, Rep. James R. Miceli, Rep. Peter J. Larkin, Rep. Robert S. Hargraves, Rep. Emile J. Goguen, and Rep. Mark J. Carron.

The Respondents include the Supreme Judicial Court for the State of Massachusetts, Chief Justice Margaret Marshall, Justice Robert J. Cordy, Justice Judith A. Cowin, Justice John M. Greaney, Justice Roderick L. Ireland, Justice Martha B. Sosman, Justice Francis X. Spina, the Massachusetts Department of Public Health, Christine C. Ferguson, Commissioner of the Massachusetts Department of Public Health, Judith A. McCarthy, City Registrar for the City of Boston, and City and Town Clerks 1-350.

The Respondents also include several same-sex couples allowed intervention by the District Court including, Linda Davies, Gloria Bailey, Gina Smith, Heidi Norton, Richard Linnell, Gary Chalmners, Ellen Wade, Maureen Brodoff, Edward Balmelli, Michael Horgan, Robert Crompton, David Wilson, Julie Goodridge and Hillary Goodridge.

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The opinion of the Court of Appeals (App., 1a - 19a) is reported at 373 F.3d 219. The opinion of the District Court denying Plaintiff's Motion for a Preliminary Injunction (App. 20a-34a) is reported at 317 F. Supp. 2d 77. The Opinion of the First Circuit Court of Appeals denying Petitioner's Motion for Injunction pending appeal (App., 40a-43a) is unreported. The order of the United States Supreme Court denying Petitioner's Injunction pending appeal (App., 44a) is reported at 124 S.Ct. 2157.

JURISDICTION

The judgment of the Court of Appeals was entered on June 29, 2004. The Court of Appeals issued its mandate on July 20, 2004. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case raises issues involving the "Guarantee Clause," found in Art. IV, §4 of the United States Constitution which states as follows:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

STATEMENT OF THE CASE

The Massachusetts' Constitution uniquely grants to the Executive exclusive authority over marriage, with the proviso that the Legislature may make other provision.

> All causes of marriage,[1] divorce, and alimony, and all appeals from the Judges of probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision.

MASS. CONST. Part 2, ch. III, art. V. This section of the Constitution is a direct limitation on the power of the judiciary. It appears under Chapter III of Part 2 of the Massachusetts Constitution which establishes the judicial branch of the government. Unless the Legislature makes an express transfer of jurisdiction concerning marriage, jurisdiction to hear all causes of marriage, divorce, and alimony resides with the Governor and Council under Article V.

The Legislature has transferred only four elements of jurisdiction under Article V to the courts (divorce, alimony, annulment and affirmation). The Legislature has not transferred jurisdiction to the Massachusetts courts to hear causes of marriage related to the definition or reformulation of marriage. In 1785 the Legislature passed "An Act for regulating Marriage and Divorce," which extended jurisdiction to the courts on matters of divorce and alimony.

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[1] The SJC has interpreted the word "causes" in this provision as being equivalent to "'controversies" or "cases."' *Sparhawk v. Sparhawk*, 116 Mass 315, 317 (1874).

See 1785 Mass. Acts 69. In 1836 the Legislature extended the court's jurisdiction to questions of affirmation or annulment of marriage. *See* Mass. Rev. Stat. 76, §§ 3-4 (1836). Since 1836 there has been no expansion of the subject matter jurisdiction of the court. Specifically, there has been no statute or provision by the Legislature granting jurisdiction to the court to hear a case which concerns the definition of marriage in the Commonwealth.

On November 18, 2003, the Massachusetts Supreme Judicial Court ("SJC") issued *Goodridge v. Department of Health*, 440 Mass. 309 (2003). In *Goodridge*, the SJC addressed the question "whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry." *Id.* at 312. Declaring that the SJC "interpret[s] statutes to carry out the Legislature's intent ... according to 'the ordinary and approved usages of the language'" the court stated the "everyday meaning of 'marriage' is 'the legal union of a man and woman as husband and wife' . . . and the plaintiffs do not argue that it has ever had a different meaning under Massachusetts law." *Id.* at 319 (citations omitted). The SJC "recognized the long-standing statutory understanding, derived from the common law, that 'marriage' means the lawful union of a woman and a man." *Id.* at 320. The SJC then "construe[d] civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others." *Id* at 343. The SJC characterized its decision as a "reformulation" of marriage. *Id.* at 344. The court did not invalidate the marriage laws, but instead, stated that its decision would become effective 180 days after the date of the court's order "to permit the Legislature to take such action

as it may deem appropriate in light of this opinion." *Id.*

On December 11, 2003, the Senate presented to the SJC Senate Bill 2175, entitled "An Act relative to civil unions." On February 3, 2004, the SJC rejected the Senate's proposed statutory changes. *See Opinions of the Justices to the Senate*, 440 Mass. 1201 (2004). On January 4, 2004, the Legislature met in constitutional session to change the Commonwealth's Constitution and on March 29, 2004, a "Proposal for a Legislative Amendment to the Constitution relative to the affirmation of marriage" was adopted. The Article of Amendment states, in relevant part, "It being the public policy of this commonwealth to protect the unique relationship of marriage, only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth of Massachusetts." The citizens of Massachusetts, including Plaintiffs, will have an opportunity to vote for the amendment in 2006 only if the Legislature passes the amendment again during the 2005 session. On May 17, 2004, the *Goodridge* decision became effective, which mandated the issuance of same-sex marriage licenses.

Robert Largess, a Massachusetts citizen and voter, filed a Complaint and Motion on May 10, 2004, seeking a Temporary Restraining Order, Preliminary and Permanent Injunctive Relief and a Declaratory Judgment. An Amended Complaint and a Renewed Motion was filed on May 11, 2004, adding eleven Massachusetts Legislators as Plaintiffs.

The Defendant Massachusetts Supreme Judicial Court filed a Motion to Dismiss and an Opposition to Plaintiff's

Motion.[2] Defendant Judy McCarthy also filed an Opposition to Plaintiffs' Motion.

Several same-sex couples filed a Motion to Intervene on May 11, 2004 and Plaintiffs filed an Opposition. A hearing was conducted on May 12, 2004, where the District Court denied the Motion to Dismiss, and allowed limited intervention by the proposed intervenors.[3] On May 13, 2004, the District Court entered an Order denying Plaintiffs' Motion. (App., 22a-36a). In its Order, the District Court first noted that it had not been asked to decide the wisdom of the *Goodridge* decision, nor had it been asked to vacate the *Goodridge* decision. (App., 28a-29a). Instead, the District Court recognized that it had been asked to enjoin enforcement of the *Goodridge* decision on the grounds that the decision violated the Guarantee Clause of the United States Constitution. (App., 29a).

The District Court held that it had subject matter jurisdiction over the Plaintiffs' case, that the Eleventh Amendment did not bar Plaintiff's suit, that Plaintiffs had standing under the Guarantee Clause and that the Guarantee Clause was justiciable. (App., 30a-31a). Moving to a discussion of the merits of the case, the District Court held

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[2] Although represented by the same Attorney General, Defendants Department of Public Health and its Commissioner (of the Executive Branch) took no position concerning Plaintiffs' Motion.

[3] The District Court later memorialized the oral orders entered at the hearing in a written order dated May 17, 2004. (App., 39a-41a).

that the SJC did not violate the Guarantee Clause because the Massachusetts Legislature implicitly transferred jurisdiction to the SJC to "interpret, and reinterpret, if necessary, the term marriage as it appears in the Massachusetts Constitution." (App., 34a). The District Court held that the SJC was acting within its authority and responsibility to "decide with finality all issues arising under the Massachusetts Constitution." *Id.* Therefore, the District Court held that the Plaintiffs did not have a likelihood of success on the merits and denied Plaintiff's Motion for a Preliminary Injunction.

Plaintiffs filed a Notice of Appeal on May 13, 2004, with a Motion seeking a stay of *Goodridge* pending the outcome of the appeal. On May 14, the First Circuit Court of Appeals denied the Motion for Stay, but granted an expedited appeal. (App., 42a-45a). After mentioning its concerns about justiciability and standing, the First Circuit stated that:

> *Goodridge* does not establish permanent martial law or declare the Commonwealth a monarchy; and it cannot be plausibly argued that every disagreement about allocation of power within a state government - even a very important disagreement - raises a question under article IV, §4. That this disagreement is important is obvious; but, at least so far, it is not obvious why its resolution one way rather than another threatens a republican form of government.

(App., 44a). The First Circuit denied the Injunction Pending Appeal. *Id.*

On May 14, Plaintiffs petitioned this Court to enter an emergency stay of *Goodridge*. By order that same day, this

Court declined the requested emergency stay. (App., 46a).

Plaintiffs returned to the First Circuit for the briefing and argument of their expedited appeal. On June 29, 2004, the First Circuit issued its opinion affirming the District Court's denial of injunctive and declaratory relief. (App., 1a - 19a). The First Circuit held that the issues of Plaintiff's standing and justiciability might "turn on the resolution of the merits of the underlying claim." (App., 9a). The court then turned to the merits of Plaintiffs' Guarantee Clause challenge and held that Plaintiffs did not have a "viable Guarantee Clause challenge on these facts." (App., 11a).

The First Circuit held that the text of the Guarantee Clause demonstrates that the Clause is "only implicated when there is a threat to a 'Republican Form of Government.'" (App., 12a). With regard to the separation of powers argument advanced by the Plaintiffs, the court stated that, "The Guarantee Clause does not require a particular allocation of power within each state so long as a republican form of government is preserved." (App., 13a). The court stated, "if there is any role for federal courts under the Clause, it is restricted to real threats to a republican form of government." *Id.*

Plaintiffs argued to the First Circuit that the Guarantee Clause is violated in situations where (1) the delegation or limitation of power to one branch in the state constitution is express, (2) there is a clear departure from the historic status quo, and (3) this clear departure seriously impairs a representative form of government. The First Circuit held that this Court's cases demonstrate that "most disputes concerning the relationship among a state government's constituent

branches do not offend the Constitution's guarantee of a republican form of government." (App., 14a). In holding that the Clause was not violated as Plaintiffs alleged, the court stated:

> The obvious question here is why the possibility of amending the Massachusetts Constitution, against the background of normal election of the legislature and governor by the voters, is not sufficient to eliminate any plausible claim of a deprivation of a republican form of government under the Guarantee Clause. Although the possibility of amending the constitution is not the only safeguard, it is certainly the most direct.

(App., 17a). The First Circuit then held that, "The resolution of the same sex marriage issue by the judicial branch of the Massachusetts government, subject to override by the voters through the state constitutional amendment process, does not plausibly constitute a threat to a republican form of government." (App., 18a).

REASONS FOR GRANTING THE PETITION

I.

THE FIRST CIRCUIT AND NUMEROUS STATE SUPREME COURTS ARE IN CONFLICT WITH THE SECOND AND NINTH CIRCUITS ON THE ISSUE OF THE JUSTICIABILITY OF THE GUARANTEE CLAUSE.

The First Circuit's opinion follows this Court's precedent which suggested that at least some issues under the Guarantee Clause are justiciable. Several state Supreme Courts also agree that the Guarantee Clause is justiciable in some instances. However, the Second and Ninth Circuits, in conflict with the se courts, hold that the Guarantee Clause is not justiciable.

Although there is a line of cases from this Court premised on the Guarantee Clause which have viewed matters arising under the Clause as nonjusticiable political questions, *see, e.g., Luther v. Borden*, 48 U.S. (7 How.) 1, 46-47 (1849), Justice O'Connor noted in *New York v. United States* "that perhaps not all claims under the Guarantee Clause present nonjusticiable political questions." 505 U.S. 144, 183 (1992); *see also Reynolds v. Sims*, 377 U.S. 533 (1964) ("*some* questions raised under the Guaranty Clause are nonjusticiable, where 'political' in nature and where there is a clear absence of judicially manageable standards") (emphasis added). Justice O'Connor also noted that, "Contemporary commentators have likewise suggested that courts should address the merits of such claims, at least in some circumstances. *Id.* at 185 (citing L. Tribe, AMERICAN CONSTITUTIONAL LAW 398 (2d ed. 1988); J. Ely, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 118 and n. 122-123 (1980); W. Wiecek, THE GUARANTEE CLAUSE OF THE U.S. CONSTITUTION 287-289, 300 (1972); D. Merritt, *The Guarantee Clause and State Autonomy: Federalism for a Third Century*, 88 COLUM. L. REV. 1, 70-78 (Jan. 1988); Bonfield, *The Guarantee Clause of Article IV, Section 4: A Study in Constitutional Desuetude*, 46 MINN. L. REV. 513, 560-65 (1962)). This Court, since *New York*, has reaffirmed the importance of the Guarantee Clause. *See Printz*

v. United States, 521 U.S. 898 (1997).

Following the *New York* decision, several articles were published discussing the history and purpose of the Guarantee Clause. *Luther* began a bifurcation of the Guarantee Clause between substantive (exercised by Congress) and structural/procedural review (exercised by courts). This Court in *Baker v. Carr*, 369 U.S. 186 (1962), provided guidelines regarding political questions.[4] In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Court pointed to *Baker*, noting that "*some* questions raised under the Guaranty Clause are nonjusticiable . . . ." *Id.* at 582 (emphasis added).

In 1992, the Court in *New York* stated that not all Guarantee Clause claims are nonjusticiable. This was reaffirmed in 1997 by *Printz*. There are circumstances in which the Guarantee Clause can, and should, be used to

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[4] (1) whether the case involved a question textually committed to a coordinate political department; (2) whether there is a lack of judicially discoverable and manageable standards for resolving it; (3) whether it is impossible to decide the matter without an initial policy determination of a kind clearly for nonjudicial discretion; (4) whether the court's decision of the matter would demonstrate a lack of respect for coordinate branches of government; (5) whether there is an unusual need for unquestioning adherence to a political decision already made; or (vi) whether there is potential for embarrassment of multifarious pronouncements by various departments on one question. *Id.* at 217.

protect the people.[5]

The First Circuit, in this case, held to the view adopted by this Court that some matters are justiciable under the Guarantee Clause. In discussing an objection raised by the Defendants that "Guarantee Clause claims are always non-justiciable under the political question doctrine and related caselaw," the First Circuit disagreed and recognized that "resolving the issue of justiciability in the Guarantee Clause context may also turn on the resolution of the merits of the underlying claim." (App., 8a, 9a). The First Circuit's opinion recognizes that, at least in some instances, the Guarantee Clause is justiciable.

In *Vansickle v. Shanahan*, 511 P.2d 223 (Kan. 1973), the Supreme Court of Kansas discussed the history and purpose of the Guarantee Clause, concluding that "modern analysis of the guaranty clause leads to the conclusion that neither *Luther* nor *Pacific [Telephone Co. v. Oregon, 223 U.S. 118 (1912)]* are authority for the proposition that all questions arising under the guaranty clause are nonjusticiable." *Id.* at 235; *see also State ex rel. v. City of Hutchinson*, 144 P. 241 (Kan. 1914) (holding that the Guarantee Clause is justiciable, but finding no violation of the Clause).

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[5] *See generally*, Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. COLO. L. REV. 849 (1994); Debra F. Salz, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 GEO. WASH. L. REV. 100 (1993); *see also* Jonathon K. Waldrop, *Rousing the Sleeping Giant? Federalism and The Guarantee Clause*, 15 J.L. & Pol. 267 (1999).

Similarly, the Delaware Supreme Court has held that the Guarantee Clause is justiciable. In *Rice v. Foster*, 4 Del. (4 Harr.) 479 (Del. 1847), the Delaware Supreme Court found that a law allowing the people of the state to decide by ballot whether to allow a license for intoxicating liquors violated the Guarantee Clause. The court noted that, "[B]y vesting the law making power in the people, the legislature venture[d] to introduce a pure democracy, and thus to subvert the constitution of this State, and infringe upon that of the United States, which guarantees to every State, a republican form of government." The Guarantee Clause was held to be justiciable to protect the republican form of government of the State of Delaware.

In *Kadderly v. Portland*, 74 P. 710 (Or. 1903), the Oregon Supreme Court was asked to consider whether an initiative and referendum procedure violated the Guarantee Clause. Assuming that the Clause was justiciable, the Oregon Supreme Court held that the procedure did not violate the Guarantee Clause. *Id.* at 719-20. The court held: "The purpose of this provision of the Constitution is to protect the people of the several states against aristocratic and monarchical invasions, and against insurrections and domestic violence, and to prevent them from abolishing a republican form of government." *Id* at 719; *see also State ex. rel. Huddleston v. Sawyer*, 932 P.2d 1145 (Or. 1997) (finding Guarantee Clause justiciable by judging constitutionality of sentencing guidelines under the Clause).

The Oklahoma Supreme Court also held that the Guarantee Clause is justiciable. In *In re Initiative Petition No. 348*, 820 P.2d 772 (Ok. 1991), the Oklahoma Supreme Court judged the constitutionality of an initiative petition to amend

the state constitution and held that it did not violate the Guarantee Clause. *Id.* at 780 (stating, "Accordingly, we consider whether the Petition violates Article IV, § 4 of the federal constitution.").

Likewise, the Colorado Supreme Court has considered the constitutionality of a proposed state constitutional amendment under the Guarantee Clause. In *Morrissey v. State*, 951 P.2d 911 (Col. 1998), the Colorado Supreme Court stated that the proposed amendment "is itself inconsistent with Article IV, Section 4 (the Guarantee Clause), which guarantees to every state a republican form of government." *Id* at 916.

The South Carolina Supreme Court has implicitly held the Guarantee Clause to be justiciable. In *Campbell v. Hilton Head No. 1 Public Service District*, 580 S.E. 2d 137 (S.C. 2003), the South Carolina Supreme Court held that a form of taxation by the public service district did not violate the Guarantee Clause. *Id.* at 140-41.

Other state Supreme Courts have also held that the Guarantee Clause is justiciable by deciding cases under the Clause. *See Eubanks v. Hale*, 752 So. 2d 1113, 1175 (Ala. 1999) (stating, "[A] number of guarantees afforded by the Constitution of the United States, including those contained in U.S. Const. art. IV, § 4, which provides: 'The United States shall guarantee to every state in this Union a republican form of government....'"); *In re Advisory Opinion to Governor (Ethics Com'n),* 612 A.2d 1 (R.I. 1992) (finding ethics amendment to state constitution did not violate Guarantee Clause); *State v. Lehtola*, 198 N.W. 2d 354 (Wis. 1972) (finding no violation of Guarantee Clause); *Heimerl v. Ozaukee County,* 40 N.W.2d 564, 567 (Wis. 1949) (stating,

"Taxation for a private purpose is prohibited by the clause of the federal constitution that guarantees to every state a Republican form of government (sec. 4, art. IV), as such a form of government forbids the raising of taxes for anything but a public purpose.").

In conflict with these cases holding the Guarantee Clause is justiciable, the Fifth and Ninth Circuits hold that the Guarantee Clause is non-justiciable. In *O'Hair v. White*, 675 F.2d 680 (5th Cir. 1982), the Fifth Circuit held that the Guarantee Clause always presented a non-justiciable political question. *Id.* at 684 n.5 (stating, "[S]uits arising under the guarantee clause clearly present nonjusticiable political questions.").

The Ninth Circuit has also been particularly vigilant in holding that the Guarantee Clause is always non-justiciable. In *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001), the Ninth Circuit stated, "A challenge based on the Guarantee Clause, however, is a nonjusticiable political question." *See also Barber v. State of Hawaii*, 42 F.3d 1185, 1199 (9th Cir. 1994)(dismissing Guarantee Clause claim as nonjusticiable); *State of Nev. v. Watkins*, 914 F.2d 1545, 1558-59 (9th Cir. 1990) (same).

There is a clear conflict among the federal and state courts concerning the justiciability of a Guarantee Clause claim. The Fifth and Ninth Circuits hold that such a claim is non-justiciable while precedent from this Court, the First Circuit's opinion in the present case, and numerous state Supreme Courts, find the Guarantee Clause to be justiciable.

The Guarantee Clause is a "protector of basic individual

rights and should not be treated as being solely about the structure of government." Chemerinsky, 65 U. COLO. L. REV. at 851. "[T]he Guarantee Clause should be regarded as assuring basic political rights, and therefore it is very much the judicial role to interpret and apply this constitutional provision." *Id.* at 852. To categorize Guarantee Clause issues as political and nonjusticiable, leads to the "only instance in which nonjusticiability has the effect of rendering a constitutional provision a nullity." *Id.* at 851. Professor Chemerinsky clarifies which cases should be considered political questions, and which should not. "Matters should be deemed to be a political question only if there is reason to believe that the judicial is ill-suited to enforce a particular constitutional provision . . . ." *Id.* at 853. This case falls squarely within the court's power to "defin[e]and safeguard[] fundamental rights - rights that are truly at the heart of the republican government." *Id.* at 869.

This Court should resolve the conflict regarding the justiciability of the Guarantee Clause.

II.

THERE IS A CONFLICT AMONG THE CIRCUIT COURTS ON THE ISSUE OF WHO HAS STANDING TO BRING A GUARANTEE CLAUSE CLAIM.

The First Circuit's opinion in this case held that, "[T]he circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits of the underlying claim." (App., 7a). Therefore, the First Circuit would proceed directly to the merits of the federal

plaintiff's Guarantee Clause claim in order to determine whether the plaintiff has standing. The only other reported case on standing in a Guarantee Clause challenge is a District of Columbia District Court case. *See Adams v. Clinton*, 90 F. Supp.2d 27, 34 (D.D.C. 2000). in *Adams*, a group of Washington D.C. residents brought suit requesting Congressional representation and challenging the existence of a control board. The Plaintiffs alleged violations of the Guarantee Clause. IN response to the Defendants' arguments that the Plaintiffs lacked standing to bring a Guarantee Clause challenge, the court stated, "[T]he *Adams* plaintiffs have clearly alleged a concrete injury (deprivation of their right to a republican form of local government) that is traceable to the existence of the Control Board, and that would be redressed, at least in part, by its elimination." The court recognized that all the citizens of the District of Columbia had alleged a sufficient harm to justify standing.

In contrast, the Second Circuit refuses to allow citizens taxpayer standing under the Guarantee Clause. In *Schulz v. Jennings*, 198 F.3d 234, 1999 WL 822515 (2d Cir. 1999), the plaintiff argued that "the Guarantee Clause confers standing upon all citizens who seek to challenge the constitutionality of state actions that violate their right to a republican form of government, regardless of whether those citizens have suffered a specific or particularized injury." The Second Circuit explicitly rejected this argument and requires all plaintiffs seeking standing under the Guarantee Clause to demonstrate a concrete and particular injury. *Id.*

In a Guarantee Clause challenge, it is the citizens of the entire state who are concretely harmed by the violation of a republican form of government in their state. Standing would

not be conferred on all citizens of the United States when a particular state violates the republican form of government. However, all citizens of the particular state should have standing because they are the individuals subjected to tyranny through a violation of the republican form of government. The test regarding injury should be consonant with the answer to the question who is harmed by the action. In a Guarantee Clause challenge, it is the citizens of the particular state that are harmed by the action of their state denying them a republican form fo government. Therefore, it is the citizens of the state who have standing to bring a Guarantee Clause challenge.

III.

THIS CASE PRESENTS AN ISSUE OF GREAT PUBLIC IMPORTANCE CONCERNING THE APPLICATION OF THE GUARANTEE CLAUSE TO A STATE SUPREME COURT DECISION THAT IMPROPERLY AMENDS THE STATE CONSTITUTION.

This case presents an issue of great public importance not previously addressed by this Court concerning the application of the Guarantee Clause to a state supreme court decision that improperly amends a state constitution. The Guarantee Clause should apply to this case to protect the citizens of Massachusetts from their own state supreme court's usurpation of power. The Guarantee Clause applies to more than just the most blatant violations of the republican form of government. The citizens of Massachusetts should not be required to wait until their state supreme court sets itself up as an oligarchy before the federal courts step in to safeguard

their right to a republican form of government. The SJC in this case violated the citizens' right to a republican form of government. In this situation, the federal courts should not be reluctant to step in to protect the right to a republican form of government.

The First Circuit believed that the Guarantee Clause "is restricted to real threats to a republican form of government," although the court did not undertake to make clear what was a "real threat." (App., 13a). It is reasonable to assume that the First Circuit, when it discusses "real threats" to the republican form of government, was referring to its earlier opinion in this case refusing to stay the *Goodridge* decision. In that opinion, the First Circuit stated, "*Goodridge* does not establish permanent martial law or declare the Commonwealth a monarchy...." (App., 44a). Therefore, under the First Circuit's understanding of the Guarantee Clause, a federal court is only empowered to act under the Clause when a branch of state government establishes permanent martial law or monarchy. The First Circuit's opinion in this case bears out this understanding when it stated that, "[M]ost disputes concerning the relationship among a state government's constituent branches do not offend the Constitution's guarantee of a republican form of government." (App., 14a). The court also stated that "separation of powers violations within a state, such as those alleged by the plaintiffs, [do not] constitute Guarantee Clause violations." (App., 16a-17a).

The First Circuit's opinion renders the Guarantee Clause a nullity in all but the most extreme cases such as permanent martial law or monarchy. This understanding flies in the face of the very text of the Guarantee Clause, renders the Clause all but ineffective to protect the republican form of

government and removes the federal judiciary from its obligation to enforce the Clause.[6] The opinion conflicts with even the most basic understanding of the republican form of government protected by Article IV, §4. In recent years, the highest courts of several states have explained that respect for the separation of powers lies at the core of our republican form of government. *See, e.g., State Auditor v. Joint Committee on Legislative Research*, 956 S.W.2d 228, 233 (Missouri 1997) (invalidating committee actions, "This is the sort of impermissible interference a co-equal branch's performance of its constitutional duties against which the separation of powers doctrine is designed to guard and precisely the complicated and indirect legislative 'encroachment' against which Madison warned. 'In republican government, the legislative authority necessarily predominates.'"); *State v. King*, 973 S.W.2d 586, 588 (Tenn. 1998) ("The separation of powers doctrine arises from the precept that 'it is essential to the maintenance of republican government that the action of the legislative, judicial, and executive departments should be kept separate and distinct.'"); *Prater v. Kentucky*, 82 S.W.3d 898, 901, n.7 (Ky 2002) (invalidating legislation that conferred executive powers upon the judiciary; describing sections 27 and 28 of state constitution that "were designed to separate the powers of government and prevent concentrations of power . . . as embodying the 'cardinal principle of our republican form of government.'" "The observance of this division is essential to

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[6] Indeed, the Guarantee Clause is located in Article IV of the United States Constitution. This Article applies to every branch of the United States Government. Therefore, each branch is equally responsible for the enforcement of Article IV.

the maintenance of a republican form of government."); *The Board of County Comm'rs v. County Road Users Assoc.*, 11 P.3d 432, 439 (Colo. 2000) (en banc) ("Like the right to vote, the power of initiative is a fundamental right at the very core of our republican form of government."); *see also Vigo County Republican Central Committee v. Vigo County Comm'rs*, 834 F. Supp. 1080, 1082 (S.D. Ind. 1993) (explaining that "the principles of federalism and the separation of powers" are the tenets upon "which our republican form of government is founded").

State supreme courts have also expressly recognized that the Guarantee Clause serves as a check on the power of the judiciary. *See, e.g., Ex Parte T.B.*, 698 So.2d 127, 130 (Ala. 1997) ("[T]he judiciary cannot and should not, in a republican form of government, usurp the legislative function."); *Washington State Bar Assoc. v. Washington*, 890 P.2d 1047 (Wash. 1995) (en banc) ("it is also the law that 'American courts are constantly wary not to trench upon the prerogatives of other departments of government or to arrogate to themselves any undue powers, lest they disturb the balance of power"); *Vansickle v. Shanahan,* 511 P.2d 223, 239 (Kan. 1973) ("Were the power of judging joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control, for the judge would then be the legislator.").

The case of *Washington State Bar Association v. Washington*, 890 P.2d 1047 (Wash. 1995) (en banc) highlights the purpose and importance of the Guarantee Clause. This case invalidated a law that encroached upon the court's exclusive authority to regulate the practice of law.

> The importance of the case before us is that it deals directly with one of the cardinal and fundamental principles of the American constitutional system, both state and federal: the separation of powers doctrine. "It has been declared that the division of governmental powers into the executive, legislative, and judicial represents probably the most important principle of government declaring and guaranteeing the liberties of the people, and preventing the exercise of autocratic power, and that it is a matter of fundamental necessity, and is essential to the maintenance of a republican form of government."

Id. at 1050. Protecting the delicate balance of powers is at the core of the Guarantee Clause and each branch is bound to prevent such encroachments.

The vital right under the Guarantee Clause means nothing if courts will not act until the state imposes permanent martial law or declares Massachusetts a monarchy. Justice Harlan, in his dissent in *Plessy v. Ferguson,* viewed the Guarantee Clause as a protector of individual rights that can and should be used by the courts to invalidate actions that fall far short of permanent martial law or declaration of a monarchy. He characterized Louisiana's laws that interfered with basic rights based on race, as

> inconsistent with the guaranty given by the constitution to each state of republican form of government, and may be stricken down by congressional action, or by the courts in the discharge of their solemn duty to maintain the supreme law of the land, anything in the constitution or laws of any

state to the contrary notwithstanding.

163 U.S. 537, 563-64 (1896). James Madison similarly indicated that the federal courts can and should invalidate state actions that violate the separation of powers as established by the people in their state constitutions: "Hence a double security arises **to the rights of the people**. The different governments will control each other, at the same time that each will be controlled by itself." *Printz v. U.S.*, 521 U.S. 898, 922 (1997)(quoting James Madison, THE FEDERALIST No. 51, p.323) (emphasis added).

It elevates form over substance to confine the Guarantee Clause to those instances of the worst sorts of abuse of the republican form of government. Separation of powers is essential to the prevention of tyranny and is at the core of the republican form of government. If this vital principle is not protected by the Guarantee Clause, then the people are just as prone to subjection under a tyrannical system of government as they would be if Massachusetts declared permanent martial law. The necessity of allowing a Guarantee Clause challenge in more than just "extreme" cases is highlighted by the circumstances of the present case.

A. The Division of Powers In The Massachusetts Constitution.

In order to illustrate the importance of the Guarantee Clause and its applicability in this case, it is important to understand the division of powers in the Massachusetts Constitution and how the *Goodridge* court violated this important division of powers.

The Massachusetts Constitution, like most other states, establishes three co-equal and independent branches of government. The legislative power is reposed in the General Court, MASS. CONST. Part 2, ch. I, § I, arts. I, IV; the supreme executive power is reposed in the Governor, MASS. CONST. Part 2, ch. II, § 1; and the judicial power is reposed in the judiciary, MASS. CONST. Part. 2, ch. III. No branch may exercise the powers of either of the other two branches. MASS. CONST. Part 1, art. XXX. The "judicial shall never exercise the legislative and executive powers." MASS. CONST. Part 1, art. XXX. This separation is essential for preserving the rule of law and preventing tyranny. *See* THE FEDERALIST NO. 47 (James Madison) ("The accumulation of all powers, legislative, executive, and judiciary, in the same hands, whether of one, a few, or many, and whether hereditary, self-appointed, or elective, may justly be pronounced the very definition of tyranny.").

B. The *Goodridge* Court's Violation of Separation of Powers By Hearing the Case.

The Massachusetts' Constitution uniquely grants to the Executive exclusive authority over marriage, with the proviso that the Legislature may make other provision.

> All causes of marriage,[7] divorce, and alimony, and all appeals from the Judges of probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision.

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[7] The SJC has interpreted the word "causes" in this provision as being equivalent to "'controversies" or "cases."' *Sparhawk v. Sparhawk*, 116 Mass 315, 317 (1874).

MASS. CONST. Part 2, ch. III, art. V. This section of the Constitution is a direct limitation on the power of the judiciary. It appears under Chapter III of Part 2 of the Massachusetts Constitution which establishes the judicial branch of the government. ***Article V, quoted above, is the only express limitation on the power of the judiciary contained within the Constitution***. Unless the Legislature makes an express transfer of jurisdiction concerning marriage, jurisdiction to hear all causes of marriage, divorce, and alimony resides with the Governor and Council.

The Legislature has transferred only four elements of jurisdiction under Article V to the courts (divorce, alimony, annulment and affirmation), none of which encompass the right to "reformulate" marriage itself or amend the definition *contained in the state constitution.* The Legislature has not transferred jurisdiction to the Massachusetts courts to hear causes of marriage related to the definition or reformulation of marriage. Nor could the Legislature make such a transfer. The definition of the word marriage, as described below, was enshrined in the Massachusetts Constitution when it was adopted. That definition - marriage is a "union of one man and one woman" - can only be changed by an amendment to the Constitution. While the Legislature is empowered to propose constitutional amendments, it is the people who have the ultimate authority to amend the constitution. The Legislature cannot delegate power to the Courts with which it has not been entrusted.

In 1785 the Legislature passed "An Act for regulating Marriage and Divorce," which extended jurisdiction to the courts on matters of divorce and alimony. *See* 1785 Mass. Acts 69. In 1836 the Legislature extended the court's

jurisdiction to questions of affirmation or annulment of marriage. *See* Mass. Rev. Stat. 76, §§ 3-4 (1836). Since 1836 there has been no expansion of the subject matter jurisdiction of the court. *Specifically, there has been no statute or provision by the Legislature granting jurisdiction to the court to hear a case which concerns the definition of marriage in the Commonwealth.*

The Massachusetts Constitution and the decisions of the SJC are clear: a specific grant of jurisdiction from the Legislature is necessary in order for any court to hear any cases or controversies concerning marriage. *Goodridge* is clearly a controversy concerning marriage. It does not, however, fall under any of the four categories of controversies over which the courts have jurisdiction. *Goodridge* is neither a controversy concerning divorce and alimony, nor a controversy concerning affirmation or annulment of marriage. *Goodridge* presented a question entirely separate from those over which the court has jurisdiction. *Goodridge* called for a redefinition of marriage. *See* 440 Mass. at 337 ("***Certainly our decision today marks a significant change in the definition of marriage as it has been inherited from the common law, and understood by many societies for centuries***.")(emphasis added). Such a case does not fall within the current jurisdiction of the SJC. Therefore, the SJC exceeded its powers when it heard the *Goodridge* case.

C. The *Goodridge* Court's Violation of Separation of Powers by Improperly Using a Judicial Decision to "Amend" the State Constitution.

The *Goodridge* court also violated its limitations imposed

upon it by the republican form of government created by the people of Massachusetts when it improperly "amended" the Massachusetts Constitution by its decision.

The word "marriage" in the Massachusetts Constitution is contained in the only section that places a limitation on the courts' jurisdiction.[8] The definition of that word contained the everyday common meaning of that term, which the *Goodridge* court and the parties recognized, as a union of one man and one woman. This definition was enshrined in the Constitution at the time it was adopted. An amendment to the definition of marriage can only be accomplished by a vote of the citizens of the Commonwealth. *See, e.g., Anderson v. Secretary of Com.*, 255 Mass. 366, 368 (1926) ("The Constitution as amended is the direct and fundamental expression of the sovereign will of the citizens of the commonwealth. . . . It controls as it is written until changed by the authority by which it was established"). In *Loring v. Young*, the SJC explained that when the will of the people, as expressed in the Constitution, "has been ascertained, it must prevail." 239 Mass. 349, 373 (1921).

A particularly instructive application of this principle is found in *Opinion of the Justices to the Senate*, 324 Mass. 746, 85 N.E.2d 761 (1949). In that case a proposed bill in the Senate sought to expand the definition of "public highways or bridges" as those words are contained in Article LXXVIII of

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[8] Massachusetts is unique in its grant of jurisdiction over marriage cases completely to the Governor and the Council. The only other state in the Union that comes close is Hawaii which gives the Legislature "the power to reserve marriage to opposite-sex couples." HAW. CONST. Art. 1, §23.

the Amendments to the Constitution. *Id.* at 747. The proposed expanded definition that the Senate sought to implement would have demanded that the constitution's terms "public highways and bridges" be understood to include "subways, tunnels, viaducts, elevated structures and rapid transit extensions." *Id.* at 748. The SJC condemned this act of "legislative fiat," *id.*, which sought to amend the people's Constitution:

> The function of a written constitution adopted by the people is to establish by their votes an objective standard of conduct by which all departments of the government, executive, legislative and judicial alike, shall be bound, until the constitution is changed by another vote of the people. In order that this function may be performed, and that the will of the people may prevail, ***it is necessary that the words inserted into the constitution by their votes be interpreted as they meant them to be interpreted at the time and in the circumstances of their adoption***. Accordingly, this court said in *Attorney General v. Methuen*, 236 Mass. 564, at page 573, "An amendment to the Constitution is one of the most solemn and important of instruments. . . . ***Its words should be interpreted in 'a sense most obvious to the common understanding at the time of its adoption***,' because it is proposed for public adoption and must be understood by all entitled to vote."

Id. at 748-49 (emphasis added).

The Legislature's redefinition would not give to those words "their natural and obvious sense according to common

and approved usage," *id.* at 750, and the "voters of the Commonwealth could not have had any such meaning in mind when they adopted" that provision of the constitution. *Id.* "The Legislature is bound by that article as adopted and cannot now by enacting a declaratory statute change the meaning of the article so as to permit such diversion." *Id.* at 752.

"[The Constitution's] words should be interpreted in a sense most obvious to the common understanding at the time of its adoption, because it is proposed for public adoption and must be understood by all entitled to vote." *Cohen v. Attorney Gen.*, 357 Mass. 564, 571, 259 N.E.2d 539 (1970) (citing *Attorney Gen. ex rel. Mann v. Methuen*, 236 Mass. 564, 573, 129 N.E. 662 (1921); *see also Opinion of the Justices to the Senate*, 413 Mass. 1201, 1204, 595 N.E.2d 292 (1992) (same); *Opinion of the Justices*, 308 Mass. 619, 626, 33 N.E.2d 275 (1941) (same); *Loring*, 239 Mass. at 372 (same).

The SJC's precedent (prior to *Goodridge*) is clear that the word marriage, because it is in the Massachusetts Constitution, *must* be interpreted as it was understood at the time adopted into the constitution. Any amendment to that word *must* be made by the citizens – not the legislature, executive or judicial branches.

What the SJC did cannot be deemed a "reformulation." Instead, it is a radical redefinition of the term and an amendment of the Constitution by judicial fiat. When a court reforms a written document, the ultimate goal is to change the document so as to reflect the true intentions of the parties. *See* BLACK'S LAW DICTIONARY 1281 (6th ed. 1990).

A "reformulation" cannot alter the institution of marriage itself as the people intended when they approved the Constitution – that it is a union of one man and one woman. The SJC explained that the meaning of marriage has always been, including at the time it was written into the state constitution, a union between one man and one woman. Changing the meaning of marriage from a "union of one man and one woman" to a union of "two persons"is not a reformulation, but is an improper amendment of the Constitution.

The present case is a case where a Guarantee Clause challenge should be allowed and acted upon by the federal courts. A republican form of government may be as easily overthrown by gradual usurpation of power as it would be by violent overthrow. The courts should not wait until the day that permanent martial law or monarchy is declared, but should instead abide by their constitutional obligation under Article IV, §4 and move to protect the rights of the citizens of Massachusetts to live in a republican form of government free from tyranny, whether that comes at the barrel of a gun or by the decree of a court. Tyranny may come in various forms, but it is no less an enemy of freedom because it may disguise itself in the pen of a state supreme court. The Guarantee Clause was placed in the United States Constitution to ensure that the states follow their own republican form of government. Massachusetts has not. This Court should grant Certiorari to take this case and fulfill its duty under Article IV, §4 to protect the citizens of Massachusetts' right to a republican form of government.

CONCLUSION

The Petition for Writ of Certiorari should be granted.

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APPENDIX A

United States Court of Appeals,
First Circuit.

Robert P. LARGESS, Elizabeth A. Poirier, John A. Lepper, Edward G. Connolly, Christopher P. Asselin, Steven C. Panagiotakos, Philip Travis, James R. Miceli, Peter J. Larkin, Robert S. Hargraves, Emile J. Goguen, Mark J. Carron,
Plaintiffs, Appellants,

v.

SUPREME JUDICIAL COURT FOR the STATE OF MASSACHUSETTS; Chief Justice Margaret Marshall, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Robert J. Cordy, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Judith A. Cowin, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice John M. Greaney, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Roderick L. Ireland, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Martha B. Sosman, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Francis X. Spina, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Massachusetts Department of Public Health; Christine C. Ferguson, in her official capacity as Commissioner of the Massachusetts Department of Public Health; Judith A. McCarthy, in her official capacity as City

Registrar for the city of Boston; City and Town Clerks 1-350; Linda Davies; Gloria Bailey; Gina Smith; Heidi Norton; Richard Linnell; Gary Chalmners; Ellen Wade; Maureen Brodoff; Edward Balmelli; Michael Horgan; Robert Crompton; David Wilson; Julie Goodridge; Hillary Goodridge, Defendants, Appellees.

No. 04-1621.
Heard June 7, 2004.
Decided June 29, 2004.

Before BOUDIN, Chief Judge, LYNCH, Circuit Judge, and HOWARD, Circuit Judge.

PER CURIAM.

Plaintiffs brought suit in United States District Court against the Supreme Judicial Court of Massachusetts (the "SJC") and others, alleging that the remedy adopted in the same-sex marriage decision, *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), violated their rights under the Guarantee Clause of the federal Constitution. The SJC, in a divided opinion, held in *Goodridge* that "barring an individual from the protection, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution." 798 N.E.2d at 969. As a remedy, the court ordered that the state of Massachusetts recognize the marriage of same-sex couples within six months of the opinion's issuance. Id. at 968-70. The SJC later held that it was an insufficient remedy under the Massachusetts Constitution merely to afford same-sex partners the same

benefits as married couples without also recognizing their marriage. *See Opinions of the Justices to the Senate*, 440 Mass. 1201, 802 N.E.2d 565, 569-72 (2004).

The plaintiffs, a Massachusetts citizen named Robert Largess and eleven members of the Massachusetts legislature acting as individuals, sought to enjoin the May 17, 2004 implementation of *Goodridge* and the issuance or recording of marriage licenses to same-sex couples. Julie Goodridge and her new spouse Hillary Goodridge, the named plaintiffs in the *Goodridge* case, along with several others, intervened in the federal action on the side of the defendants.

The plaintiffs' federal suit asserted that the remedy[1] that the SJC adopted in *Goodridge* redefined marriage in violation of separation-of-powers principles in the Massachusetts Constitution. Under the state constitution, according to the plaintiffs, it is the prerogative of the state legislature, not the courts, to define the term "marriage." The plaintiffs also asserted that the Massachusetts Constitution itself defines the term "marriage" according to its historical meaning as a union between a man and a woman, and thus that *Goodridge* effected an impermissible amendment of the state constitution that further violated separation-of-powers principles. From the initial premise that the state constitution was violated, the

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[1] Plaintiffs assert that they are not challenging any holding by the SJC that same-sex couples are entitled to marital benefits. Rather, they say, the challenge is to the SJC's "usurping" the legislature's prerogative to define the term "marriage" and to its redefinition of that term in a way that is inconsistent with the understanding held by the framers of the Massachusetts Constitution.

plaintiffs next asserted that the remedy in *Goodridge* violated their rights under the federal Guarantee Clause of the U.S. Constitution by depriving them of a republican form of government.

In support of their first argument that the SJC usurped the legislature's authority, the plaintiffs relied heavily on one clause of the Massachusetts Constitution:

> All causes of marriage, divorce, and alimony, and all appeals from the judges of probate shall be heard and determined by the governor and council, until the legislature shall, by law, make other provision.

Mass. Const. pt. 2, ch. III, art. V. The SJC had earlier rejected that very argument as "based on the erroneous premise that [*Goodridge*] constituted a 'cause[ ] of marriage, divorce, [or] alimony' within the meaning of the Massachusetts Constitution." *Goodridge v. Dep't of Public Health*, No. SJC-08860 (Mass. May 7, 2004) (order denying motion to intervene).

The plaintiffs, arguing state law illegality, also relied on the SJC's holding in *Opinion of the Justices*, 324 Mass. 746, 85 N.E.2d 761 (1949), that the legislature would impermissibly amend the Massachusetts Constitution were it to pass a bill providing that "subways, tunnels, viaducts, elevated structures and rapid transit extensions ... are hereby declared to be public highways or bridges within the meaning of" the Massachusetts Constitution. 85 N.E.2d at 762. Such a bill, held the SJC, would contravene the principle that the state constitution's "words are to be given their natural and obvious sense according to common and approved usage at

the time of their adoption." *Id.* at 763. Similarly, the plaintiffs argued that by altering the historic meaning of the term "marriage," which is contained in the Massachusetts Constitution, the SJC in Goodridge itself amended the state constitution, a process that normally must be initiated by voters of Massachusetts and acted upon by the legislature, see Mass. Const. amend. art. XLVIII.

The federal district court denied the plaintiffs' requests for preliminary and permanent injunctive relief, a declaratory judgment, and a temporary restraining order.[2] *Largess v. Goodridge*, No. 04-10921-JLT, 2004 U.S. Dist. LEXIS 8461, at *18 (D.Mass. May 13, 2004). The court concluded that the SJC did, under the Massachusetts Constitution, have the power to redefine marriage and that, in doing so, the SJC did not perform a legislative act. See id. at *13-*18. The plaintiffs

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[2] To obtain preliminary injunctive relief, plaintiffs had the burden of showing (1) a likelihood of success on the merits; (2) that they would suffer irreparable injury if injunctive relief were not issued; (3) that such injury outweighs any harm that would stem from granting injunctive relief; and (4) that the public interest weighs in their favor. *See R.I. Dep't of Envtl. Mgmt. v. United States*, 304 F.3d 31, 45 (1st Cir.2002). The standard is virtually identical for permanent injunctive relief, except that "the movant must show actual success on the merits of the claim, rather than a mere likelihood of such success." *K-Mart Corp. v. Oriental Plaza, Inc.*, 875 F.2d 907, 914-15 (1st Cir.1989). The decision whether to grant relief is based on a balancing of the different factors, with likelihood of success playing a pivotal role. *See Ross-Simons of Warwick, Inc. v. Baccarat, Inc.*, 102 F.3d 12, 16 (1st Cir.1996).

appealed the denial of preliminary and permanent injunctive relief and the denial of a declaratory judgment, and requested an injunction pending appeal.

By order dated May 14, 2004, this court denied the requested injunction pending appeal on the ground that the plaintiffs' "showing so far made as to likelihood of success [on the claimed deprivation of a republican form of government] is not sufficient to justify interim relief." In doing so, we noted various potential barriers to plaintiffs' claims, including the doctrine that the decisions of a state's highest court on issues of state law, including state constitutional law, are generally treated as authoritative by federal courts. *See Johnson v. Fankell*, 520 U.S. 911, 916, 117 S.Ct. 1800, 138 L.Ed.2d 108 (1997); *Schad v. Arizona*, 501 U.S. 624, 636, 111 S.Ct. 2491, 115 L.Ed.2d 555 (1991); *Murdock v. City of Memphis*, 87 U.S. (20 Wall.) 590, 22 L.Ed. 429 (1874). We expedited the appeal, and oral argument was held on June 7, 2004.

On May 17, 2004, after the plaintiffs had filed their appeal but before oral arguments were heard, Massachusetts implemented *Goodridge's* requirement that same-sex marriage be recognized. Since then, Massachusetts has issued marriage licenses to same-sex couples and has recorded same-sex marriages. Thus, the plaintiffs' desired injunction would now have the effect of stopping this practice after, rather than before, it had begun.[3]

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[3] For this reason, there is no merit to the argument of defendant-intervenors (which was not joined by the state defendants) that this appeal is moot because May 17 has come and passed. Injunctive relief could now issue to stop future

I.

The state defendants and the defendant-intervenors raise a series of preliminary objections, some of which involve interesting and difficult issues.[4]

First, the defendants argue that the plaintiffs lack standing because, at most, they share an undifferentiated harm with other voters. *Allen v. Wright*, 468 U.S. 737, 754, 104 S.Ct. 3315, 82 L.Ed.2d 556 (1984); *Schlesinger v. Reservists Comm. to Stop the War*, 418 U.S. 208, 220- 21, 94 S.Ct. 2925, 41 L.Ed.2d 706 (1974). But the circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits of the underlying claim. If the plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances,[5]

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marriages, so a live controversy is still present and the case is not moot.

[4] One preliminary objection of the defendants is based on asserted Eleventh Amendment immunity. We have no need to address this issue. *See Parella v. Ret. Bd. of R.I. Employees' Ret. Sys.*, 173 F.3d 46, 56-57 (1st Cir.1999) (need not reach Eleventh Amendment issue if other grounds for decision in favor of party asserting immunity are available).

[5] It is of note for purposes of the standing inquiry that the Guarantee Clause makes the guarantee of a republican form of government *to the states*; the bare language of the Clause does not directly confer any rights on individuals vis-á-vis the states. Whether, in the sorts of extreme cases discussed below, voters or other individuals could enforce the

then the usual standing inquiry--which distinguishes between concrete injuries and injuries that are merely abstract and undifferentiated--might well be adjusted to the nature of the claimed injury. *Cf. Flast v. Cohen*, 392 U.S. 83, 105-06, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968) (in certain circumstances, federal taxpayers have standing to raise Establishment Clause claims against congressional acts).

A second preliminary objection made by the defendants is that Guarantee Clause claims are always non-justiciable under the political question doctrine[6] and related caselaw. *See Luther v. Borden*, 48 U.S. (7 How.) 1, 42, 12 L.Ed. 581 (1849) (finding non-justiciable a Guarantee Clause argument by an individual claiming to act under the authority of a state charter government because Congress, not the federal courts, should decide which of two competing Rhode Island governments should be recognized). At oral argument, the state defendants retreated from this absolutist position and acknowledged that there may be extreme cases in which a Guarantee Clause claim would be justiciable, such as those involving "permanent martial law, [the] declaration of a monarchy, [or] perhaps a hostile takeover of one branch by another." Another potential example, defendants

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Clause is an issue we need not decide.

[6] The political question doctrine has been infrequently used in recent times. As this court noted in *Doe v. Bush*, 323 F.3d 133 (1st Cir.2003), in the last forty years (now forty-one) the Supreme Court has found a case non-justiciable on the basis of the political question doctrine only twice, and it has explicitly rejected the doctrine in a number of cases. *Id.* at 140-41.

acknowledged, might be a case presenting the same facts as this case but in which the state constitution had no mechanism for amendment, so that it was simply beyond the power of the people to alter the SJC's holding. These concessions by the state defendants demonstrate that resolving the issue of justiciability in the Guarantee Clause context may also turn on the resolution of the merits of the underlying claim.

Another preliminary objection advanced by the defendants is that this court should defer to the SJC's resolution of the Massachusetts constitutional law questions raised by the plaintiffs. Because the claimed federal Guarantee Clause violation here depends on supposed state constitutional violations that the SJC has specifically rejected, the defendants argue that the plaintiffs cannot establish a necessary premise to their federal case. The defendants are correct that federal courts should generally defer to a state's highest court on issues of state law. *See Johnson*, 520 U.S. at 916, 117 S.Ct. 1800; *Schad*, 501 U.S. at 636, 111 S.Ct. 2491; *Murdock*, 87 U.S. at 590, 87 U.S. 590. But it is at least arguable that the Guarantee Clause might provide an exception to that rule of deference in extreme cases, such as where the members of a state's highest court declared the state to be a monarchy and themselves its regents. This issue ultimately need not be resolved here, because, as we explain below, the plaintiffs have not established a federal Guarantee Clause violation on the facts here, regardless of whether the remedy in *Goodridge* offends the Massachusetts Constitution.[7]

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[7] For this reason, we do not consider the district court's determination of the state, not federal, law issue of whether the SJC's exercise of jurisdiction and holding in

II.

The crucial question raised by plaintiffs' case is why the state constitutional violations they allege, assuming they exist, amount to a violation of the federal Constitution's Guarantee Clause. Plaintiffs' argument is that the alleged transgressions of the Massachusetts Constitution have deprived them of a republican form of government by intruding on the people's rights to elect representatives and structure the government. According to the plaintiffs, not every separation-of-powers violation under a state constitution leads to this result, but this one does. Plaintiffs argue that this is because here three conditions have been met: (1) the delegation or limitation of power to one branch in the state constitution is express, (2) there is a "clear departure" from the historic status quo, and (3) this "clear departure" seriously impairs a representative form of government.

Defendants argue that the Supreme Court has found Guarantee Clause claims non-justiciable where they were " 'political' in nature and where there [was] a clear absence of judicially manageable standards." *Reynolds v. Sims*, 377 U.S.

Goodridge were consistent with the Massachusetts Constitution. As the brief for the state defendants filed by the Attorney General of Massachusetts notes, a federal court "should be wary of ... attempt[s] to draw the Court into reviewing the decision of a state's highest court on matters of state constitutional law." The district court's approach unnecessarily opened the door, as the state defendants note, to a new way "for those dissatisfied by state court decisions to seek federal court review," by simply labeling their dissatisfaction as a Guarantee Clause claim.

533, 582, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964) (citing *Baker v. Carr*, 369 U.S. 186, 217-32, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962)). In response, plaintiffs say that their own criteria provide the needed judicially manageable standards, but they do not purport to find those standards in Supreme Court precedent.

Whether or not the plaintiffs can satisfy their self-tailored test, they simply have no viable Guarantee Clause claim on these facts. First, the text of the Guarantee Clause does not support such a claim. Second, the Supreme Court's caselaw interpreting the Guarantee Clause rejects the plaintiffs' expansive reading of the provision. Third, recognizing the plaintiffs' claim would ultimately undermine the very purposes of the Guarantee Clause, as the Supreme Court has noted.

We begin with the text of the Guarantee Clause. It provides that:

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic Violence.

U.S. Const. art. IV, § 4. We do not purport to spell out the entire scope or meaning of the Clause's guarantee of a republican form of government. In fact, scholars have interpreted this portion of the Guarantee Clause in numerous, often conflicting, ways. See William M. Wiecek, *The Guarantee Clause of the U.S. Constitution* 293-303 (1972)

(outlining different interpretations of the Guarantee Clause); *see also* Akhil Reed Amar, *The Central Meaning of Republican Government: Popular Sovereignty, Majority Rule, and the Denominator Problem*, 65 U. Colo. L.Rev. 749, 749 (1994); Erwin Chemerinsky, *Cases Under the Guarantee Clause Should be Justiciable*, 65 U. Colo. L.Rev. 849, 864-69 (1994); Henry Paul Monaghan, *We the Peoples, Original Understanding, and the Constitutional Amendment*, 96 Colum. L.Rev. 121, 164-65 (1996); G. Edward White, *Guaranteeing a Republican Form of Government: Reading the Guarantee Clause*, 65 U. Colo. L.Rev. 787, 803 (1994). And John Adams himself, twenty years after ratification of the Constitution, confessed that he "never understood" what the Guarantee Clause meant and that he "believ[ed] no man ever did or ever will." Letter from John Adams to Mercy Warren (July 20, 1807), *quoted in* Wiecek, *supra,* at 13.

Despite the conflicting views on the precise meaning of the Guarantee Clause, the text itself provides guidance. The first portion of the Clause is only implicated when there is a threat to a "Republican Form of Government." "Republican" is commonly defined as "of, relating to, or having the characteristics of a republic: having the form or based on the principles of a republic." *Webster's Third New International Dictionary* 1928 (1993). "Republic," in turn, is defined as "a government in which supreme power resides in a body of citizens entitled to vote and is exercised by elected officers and representatives responsible to them and governing according to law." *Id.*; *see also Oxford English Dictionary* (2d ed.1989) (defining "republic" as "[a] state in which the supreme power rests in the people and their elected representatives or officers, as opposed to one governed by a king or similar ruler"). The Guarantee clause does not require

a particular allocation of power within each state so long as a republican form of government is preserved. Indeed, the forms of each state government at the time of the adoption of the Constitution varied in terms of separations of powers, see Robert J. Pushaw, Jr., *Justiciability and Separation of Powers: A Neo-Federalist Approach*, 81 Cornell L.Rev. 393, 408-11 (1996), and are each presumed to have been "Republican" within the meaning of the Guarantee Clause, *see Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76, 22 L.Ed. 627 (1874). If there is any role for federal courts under the Clause, it is restricted to real threats to a republican form of government. The allocation of powers, including the amendment powers, set forth in the Massachusetts Constitution, at the time of adoption and now, self-evidently do not violate the Clause.

Comparing the text of the Guarantee Clause to the different text of Article II, § 1, cl. 2 of the U.S. Constitution provides further support for limiting federal court intervention in state separation-of-powers violations, except, perhaps, in the most egregious circumstances. The text of Article II, § 1, cl. 2 provides that "[e]ach State shall appoint, in such Manner as the Legislature thereof may direct" electors for President and Vice President. In contrast to the Guarantee Clause, this clause explicitly implicates state separation-of-powers issues by conferring a right or obligation upon one branch of the state government. The extent to which this more explicit text authorizes federal courts to intervene in state separation-of-powers violations is nonetheless far from clear. While several members of the Supreme Court have suggested that federal courts can indeed review the internal allocations of power in a state government under the text of this clause, *see Bush v. Gore*, 531 U.S. 98, 112, 121 S.Ct. 525, 148

L.Ed.2d 388 (Rehnquist, C.J., concurring) (joined by Justices Scalia and Thomas), that argument has been rejected by other members of the Court, *see id.* at 123-24, 121 S.Ct. 525 (Stevens, J., dissenting) (joined by Justices Ginsburg and Breyer) ("[N]othing in Article II of the Federal Constitution frees the state legislature from the constraints in the State Constitution that created it."). Accordingly, it is not clear whether the text of Article II, § 1, cl. 2 provides a basis for federal courts to review potential state separation-of-powers violations. In the absence of extreme cases, it is hard to understand the much less explicit text of the Guarantee Clause, which does not clearly reference state separation-of-powers issues, generally to authorize such review.

The Supreme Court cases addressing the Guarantee Clause confirm what the plain text of the Clause suggests: most disputes concerning the relationship among a state government's constituent branches do not offend the Constitution's guarantee of a republican form of government. The Supreme Court first said as much in *Forsyth v. City of Hammond*, 166 U.S. 506, 17 S.Ct. 665, 41 L.Ed. 1095 (1897). Responding to a claim that powers belonging to a state legislature were given to the state courts in violation of the Guarantee Clause, the Supreme Court noted that "[t]he preservation of legislative control in such matters is not one of the essential elements of a republican form of government" that is guaranteed to the states. *Id.* at 519, 17 S.Ct. 665. The Court later generalized this point, observing in response to a Guarantee Clause claim that "[h]ow power shall be distributed by a state among its governmental organs is commonly, if not always, a question for the state itself." *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612, 57

S.Ct. 549, 81 L.Ed. 835 (1937); *see also Pac. States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 150-57, 32 S.Ct. 224, 56 L.Ed. 377 (1912) (Guarantee Clause defense asserted by corporation against state's action to enforce payment of taxes is non-justiciable).

Plaintiffs argue that the Supreme Court has not closed the door to Guarantee Clause claims. They point out that the Court assumed arguendo that the Clause was applicable in *New York v. United States*, 505 U.S. 144, 185, 112 S.Ct. 2408, 120 L.Ed.2d 120 (1992), and that it used some expansive language to describe the Clause in *Printz v. United States*, 521 U.S. 898, 919, 117 S.Ct. 2365, 138 L.Ed.2d 914 (1997).[8] But as the plaintiffs acknowledge, neither *New York* nor *Printz* affirmatively held that the Guarantee Clause could appropriately be invoked on the facts in those cases. Both cases, moreover, are easily distinguishable from the present case because they involved claims by a state that the executive and legislative branches of the federal government were interfering with state matters. In this suit, by contrast, individuals are attempting to invoke the Guarantee Clause against state officials, and federalism concerns about the

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[8] In *Printz*, the Court noted that the Guarantee Clause "presupposes the continued existence of the states and ... those means and instrumentalities which are the creation of their sovereign and reserved rights," and thus that, through the Guarantee Clause and several other clauses, the states "retained a residuary and inviolable sovereignty" when the federal government was established. 521 U.S. at 919, 117 S.Ct. 2365 (internal quotations omitted).

scope of congressional authority are simply absent.[9]

Most importantly, though, *New York* and *Printz* do not establish that separation-of-powers violations within a state, such as those alleged by the plaintiffs, constitute Guarantee Clause violations. Much to the contrary, the Court in *New York* affirmed that the Guarantee Clause (if claims under it are justiciable at all) is only offended in highly limited circumstances. It held that there was no possible violation of the Clause in that case because the states retained "the ability to set their legislative agendas" and "state government officials remain[ed] accountable to the local electorate." 505 U.S. at 185, 112 S.Ct. 2408. The same is true here.

The obvious question here is why the possibility of amending the Massachusetts Constitution, *see* Mass. Const.

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[9] Acknowledging the different context in which *New York* and *Printz* were decided, plaintiffs draw on academic commentary to argue that the Guarantee Clause confers judicially cognizable rights on individuals as well as states. *See* Chemerinsky, *supra*, 65 U. Colo. L.Rev. at 851 (the Guarantee Clause is a "protector of basic individual rights and should not be treated as being solely about the structure of government"); Debra F. Salz, *Discrimination-Prone Initiatives and the Guarantee Clause: A Role for the Supreme Court*, 62 Geo. Wash. L.Rev. 100 (1993). They also rely on a Kansas Supreme Court decision, *Van Sickle v. Shanahan*, 212 Kan. 426, 511 P.2d 223 (1973), which found justiciable (though ultimately non-meritorious) a Guarantee Clause challenge to a state constitutional amendment abolishing the offices of state treasurer and auditor. *See* 511 P.2d at 227, 240, 243.

amend. art. XLVIII, against the background of normal election of the legislature and governor by voters, is not sufficient to eliminate any plausible claim of a deprivation of a republican form of government under the Guarantee Clause. Although the possibility of amending the constitution is not the only safeguard, it is certainly the most direct.

Plaintiffs respond that the change in the definition of marriage is so momentous that it overshadows either of these checks available to the citizens of Massachusetts for two reasons. First, any amendment to the Massachusetts Constitution will take roughly two years to come into effect. Second, relying on the SJC's language in *Albano v. Attorney General*, 437 Mass. 156, 769 N.E.2d 1242, 1246 (2002), the plaintiffs contend that the SJC would not permit a constitutional amendment to render ineffective actions taken before the date of the amendment. Thus, conclude the plaintiffs, even an amendment would not void *Goodridge*, so there is no way to undo the effect of *Goodridge* between its implementation and the passage of a subsequent initiative amendment. As a result, plaintiffs argue that "in the interim, [they] suffer loss of their representative form of government in the same way they would suffer loss if the SJC had abolished the legislature."

This argument goes too far. The SJC has not abolished the legislature. The amendment process enshrined in the Massachusetts Constitution is purposely designed to be slow; that choice is itself a result of the state's republican form of government. Moreover, even were the plaintiffs' reading of *Albano* correct, an issue we do not decide, then the inability of a constitutional amendment to void *Goodridge* retroactively is also the result of a republican form of

government in action. It was the Massachusetts people who amended the state constitution in 1918 to provide for certain limitations in the process of constitutional amendment. See Mass. Const. amend. art. XLVIII, pt. II, § 2.

The resolution of the same-sex marriage issue by the judicial branch of the Massachusetts government, subject to override by the voters through the state constitutional amendment process, does not plausibly constitute a threat to a republican form of government. Absent such a threat, our federal constitutional system simply does not permit a federal court to intervene in the arrangement of state government under the guise of a federal Guarantee Clause question. Such an intervention would itself threaten federal court interference with the very form of government that the people of Massachusetts have chosen for themselves. Perhaps, in unusual and extreme cases, such as the establishment of a monarchy by a state in place of a republican form of government, individuals could utilize the federal courts to enforce the Guarantee Clause. *See The Federalist No. 43*, at 311 (J. Madison) (B. Wright ed., 1961) (the Guarantee Clause gives "the superintending government ... authority to defend the system against aristocratic or monarchical innovations"). That is not this case.

III.

We affirm the denial of injunctive and declaratory relief. No costs are awarded.

APPENDIX B

United States Court of Appeals,
First Circuit.

Robert P. LARGESS, Elizabeth A. Poirier, John A. Lepper, Edward G. Connolly, Christopher P. Asselin, Steven C. Panagiotakos, Philip Travis, James R. Miceli, Peter J. Larkin, Robert S. Hargraves, Emile J. Goguen, Mark J. Carron,

Plaintiffs, Appellants,

v.

SUPREME JUDICIAL COURT FOR the STATE OF MASSACHUSETTS; Chief Justice Margaret Marshall, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Robert J. Cordy, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Judith A. Cowin, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice John M. Greaney, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Roderick L. Ireland, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Martha B. Sosman, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Justice Francis X. Spina, in the official capacity as Justice of the Supreme Judicial Court of Massachusetts, Massachusetts Department of Public Health; Christine C. Ferguson, in her official capacity as Commissioner of the Massachusetts Department of Public

Health; Judith A. McCarthy, in her official capacity as City Registrar for the city of Boston; City and Town Clerks 1-350; Linda Davies; Gloria Bailey; Gina Smith; Heidi Norton; Richard Linnell; Gary Chalmners; Ellen Wade; Maureen Brodoff; Edward Balmelli; Michael Horgan; Robert Crompton; David Wilson; Julie Goodridge; Hillary Goodridge,

Defendants, Appellees.

No. 04-1621.

JUDGMENT

Entered: June 29, 2004

This cause came on to be heard on appeal from the United States District Court for the District of Massachusetts, and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The district court's denial of injunctive and declaratory relief is affirmed. No costs are awarded.

By the Court:
Richard Cushing Donovan, Clerk
/S/ Mark R. Syska
By: Mark R. Syska, Chief Deputy, Clerk

APPENDIX C

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 04-10921-JLT

ROBERT P. LARGESS, REP. MARK J. CARRON, REP. EMILE J. GOFUEN, REP. ROBERT S. HARGRAVES, REP. PETER J. LARKIN, REP. JAMES R. MICELI, REP. PHILIP TRAVIS, SEN. STEVEN C. PANAGIOTAKOS, REP. CHRISTOPHER P. ASSELIN, REP. EDWARD G. CONNOLLY, REP. JOHN A. LEPPER, REP. ELIZABETH A. POIRIER,

Plaintiffs,

v.

SUPREME JUDICIAL COURT FOR THE STATE OF MASSACHUSETTS, CHIEF JUSTICE MARGARET MARSHALL, JUSTICE ROBERT J. CORDY, JUSTICE JUDITH A. COWIN, JUSTICE JOHN M. GREANEY, JUSTICE RODERICK L. IRELAND, JUSTICE MARTHA B. SOSMAN, JUSTICE FRANCIS X. SPINA, in their official capacities as Justices of the Supreme Judicial Court of Massachusetts, MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH,

CHRISTINE C. FERGUSON, in her official capacity as Commissioner of the Massachusetts Department of Public Health, JUDY A. McCARTHY, in her official capacity as City Registrar for the City of Boston, CITY AND TOWN CLERKS 1-350,

Defendants.

MEMORANDUM
May 13, 2004

TAURO, J.

This is a civil action challenging the validity of the decision in *Goodridge v. Department of Public Health*,[1] a case in which Defendant Massachusetts Supreme Judicial Court ("Defendant SJC"): (1) declared that the Massachusetts ban on same-sex marriages was unconstitutional,[2](2) "construe[d the term] civil marriage to mean the voluntary union of two persons as spouses, to the exclusion of all others,"[3] and (3) stayed "[e]ntry of judgment . . . for 180 days to permit the Legislature to take such action as it may deem appropriate . . . ."[4] The stay expires on May 17,2004.

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[1] 798 N.E.2d 941 (Mass. 2003).

[2] *Id.* at 969.

[3] *Id.*

[4] *Id.* at 970.

Plaintiffs[5] seek preliminary and permanent injunctive relief, declaratory judgment, and a temporary restraining order.[6] With regard to preliminary and permanent injunctive relief, Plaintiffs urge this court to "enjoin[] Defendants,[7] . . . their agents, servants and employees and those acting in active concert and with actual notice thereof, from enforcing *Goodridge* . . . ."[8] With regard to declaratory judgment, Plaintiffs seek to have this court decree that Defendant SJC violated the United States Constitution by usurping the power

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[5] The following are the named Plaintiffs in this action: (1) Robert P. Largess, (2) Rep. Mark J. Carron, (3) Rep. Emile J. Goguen, (4) Rep. Robert S. Hargraves, (5) Rep. Peter J. Larkin, (6) Rep. James R. Miceli, (7) Rep. Philip Travis, (8) Sen. Steven C. Panagiotakos, (9) Rep. Christopher P. Asselin, (10) Rep. Edward G. Connolly, (11) Rep. John A. Lepper, and (12) Rep. Elizabeth A. Poirier.

[6] *See* Am. Compl. for T.R.O., Prelim. & Permanent Injunctive Relief & Declaratory Relief ("Am. Compl.") at 2.

[7] The following are the named Defendants in this action: (1) Supreme Judicial Court for the State of Massachusetts, (2) Chief Justice Margaret Marshall, (3) Justice Robert J. Cordy, (4) Justice Judith A. Cowin, (5) Justice John M. Greaney, (6) Justice Roderick L. Ireland, (7) Justice Martha B. Sosman, (8) Justice Francis X. Spina, (9) Massachusetts Department of Public Health, (10) Christine C. Ferguson, Commissioner of the Massachusetts Department of Public Health, (11) Judy A. McCarthy, City Registrar for the City of Boston, and (12) City and Town Clerks 1-350.

[8] Am. Compl. at 2.

of the Massachusetts Legislature, both when it exercised jurisdiction over the *Goodridge* case and when it redefined the concept of marriage in the *Goodridge* opinion.[9] Presently before this court is Plaintiffs' renewed motion for preliminary and permanent injunctive relief, declaratory relief, and a temporary restraining order.[10]

Background

In *Goodridge*, Defendant SJC addressed the question of "whether, consistent with the Massachusetts Constitution, the Commonwealth may deny the protections, benefits, and obligations conferred by civil marriage to two individuals of the same sex who wish to marry."[11] It "conclude[d] that it

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[9] *See id.*

[10] *See* Pls.' Renewed Mot. for Declaratory Relief, T.R.O., & Prelim. & Permanent Injunctive Relief ("Pls.' Renewed Mot.").

[11] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003); *see also id.* (noting that the issue is "[w]hether the Commonwealth may use its formidable regulatory authority to bar same-sex couples from civil marriage"); *id.* at 953 ("The larger question is whether . . . government action that bars same-sex couples from civil marriage constitutes a legitimate exercise of the State's authority to regulate conduct, or whether . . . this categorical marriage exclusion violates the Massachusetts Constitution.").

may not"[12]: "We declare that barring an individual from the protections, benefits, and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution."[13] But, rather than "striking down the marriage laws," which "no [party] argue[d was] an appropriate form of relief," Defendant SJC "reformulat[ed]" the term civil marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others."[14] It also stayed "[e]ntry of judgment . . . for 180 days to permit the Legislature to take such action as it may deem appropriate . . . ."[15]

Plaintiffs allege that, on and after May 17, 2004, "Defendants [Judy A.] McCarthy[, the City Registrar for the City of Boston,] and Town and City Clerks 1-350 will be required to issue [and, in fact, plan to issue] marriage licenses to same-sex couples . . . ."[16] In addition, Plaintiffs assert that, on and after May 17, 2004, Defendant Christine C. Ferguson, the Commissioner of Defendant Massachusetts Department of Public Health, and the individual who "is responsible for recording validly-issued marriage licenses[,] . . . will be required to record marriage licenses to same-sex couples . . .

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[12] *Id.* at 948.

[13] *Id.* at 969.

[14] *Id.*

[15] *Id.* at 970.

[16] Am. Compl. at 6.

."[17]

On May 11, 2004, Plaintiffs filed with this court their amended complaint for preliminary and permanent injunctive relief, declaratory relief, and a temporary restraining order.[18] Also on May 11, 2004, Plaintiffs filed a renewed motion for preliminary and permanent injunctive relief, declaratory relief, and a temporary restraining order.[19] Plaintiffs central argument, in both their complaint and their motion, is that "the actions of [Defendant SJC] in exercising jurisdiction over the *Goodridge* case and, separately, in redefining marriage, constitute actions delegated to other branches of the government under the Massachusetts constitution, thereby violating the federal constitutional guarantee to the citizens of Massachusetts [of] a republican form of government."[20] On May 12, 2004, a hearing on Plaintiffs' motion was held.

Discussion

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[17] *Id.*

[18] *See id.* at 2. On May 10, 2004, the initial complaint was filed. *See* Compl. for T.R.O.,Prelim. & Permanent Injunctive Relief, & Declaratory Relief.

[19] Pls.' Renewed Mot. at 1. On May 10, 2004, the initial motion was filed. *See* Mot. for Prelim. Inj. & T.R.O.

[20] Pls.' Renewed Mot. at 2. "[T]he [United States] Constitution's Guarantee Clause . . .directs the United States to 'guarantee to every State in this Union a Republican Form of Government.'" *New York v. United States*, 505 U.S. 144, 183 (1992) (quoting U.S. Const. art. IV, § 4).

In deciding whether to grant a preliminary injunction, this court is to weigh the following four factors: "(1) the likelihood of the movant's success on the merits; (2) the potential for irreparable harm to the movant; (3) a balancing of the relevant equities, *i.e.*, 'the hardship to the nonmovant if the restrainer issues as contrasted with the hardship to the movant if interim relief is withheld'; and (4) the effect on the public interest of a grant or denial of the injunction."[21] Yet, "the '*sine qua non* of [the preliminary injunction standard] is whether the plaintiffs are likely to succeed on the merits."[22] Significantly, the abovementioned quadripartite standard is the same test that is to be used in determining whether to grant a temporary restraining order.[23]

At the outset, it is important to emphasize that this court has not been asked to judge, nor will it undertake to judge, "the wisdom of the decision by the *Goodridge* court that denying marriage licenses to same-sex couples violated the

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[21] *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221, 1224 (1st Cir. 1993) (quoting *Narragansett Indian Tribe v. Guilbert*, 934 F.2d 4, 5 (1st Cir. 1991)) (internal citation omitted).

[22] *Id.* at 1225 (quoting *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)) (alteration in original).

[23] *See Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Bishop*, 839 F. Supp. 68, 70 (D. Me. 1993).

state constitutional rights of those individuals."[24] What is more, this court has not been asked to vacate the *Goodridge* decision.[25] Rather, this court has been asked to enjoin enforcement of the *Goodridge* decision on the ground that Defendant SJC violated the Guarantee Clause of the federal Constitution by depriving Plaintiffs of their right to a republican form of government.[26]

Defendants argue that this court lacks subject matter jurisdiction to determine whether the SJC's actions in connection with the *Goodridge* case contravened the federal Constitution's guarantee of a republican form of government.[27] Specifically, Defendants assert *seriatim* that: (1) this court lacks subject matter jurisdiction to review decisions of Defendant SJC,[28] (2) "[b]y virtue of the Eleventh Amendment, a federal court lacks jurisdiction to review state officials' compliance

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[24] Mem. of Law in Supp. of Pls.' Renewed Mot. for Declaratory Relief, T.R.O. & Prelim. & Permanent Injunctive Relief ("Pls.' Mem.") at 1.

[25] *See id.*

[26] *See id.*

[27] Supreme Judicial Court & Justices' Opp'n to Pls.' Mot. for T.R.O. & in Supp. of Court & Justices' Mot. to Dismiss ("SJC's Opp'n") at 1.

[28] *Id.*; *see* Mem. of City of Boston & Judy A. McCarthy in Opp'n to Pls.' Mot. for Prelim. Inj. & T.R.O. ("Mem. of City of Boston") at 2-4.

with state law or to order state officials to comply with state law,"[29] (3) Plaintiffs lack standing, because they cannot identify a cognizable injury that they will suffer as a result of the SJC's actions or an injury that can be redressed by the relief that they have requested,[30] and (4) "Guarantee Clause claims brought by individuals against their state governments are nonjusticiable."[31]

This court disagrees and holds that it does have subject matter jurisdiction over this action. First, as has already been pointed out, this court is not reviewing any substantive holding of the SJC with respect to the Massachusetts constitutional issues that were at the heart of the *Goodridge* case. Rather, it is determining whether certain of the SJC's actions in connection with the *Goodridge* case violated the federal Constitution, specifically its Guarantee Clause. Second, although state officials cannot be sued in federal court based on violations of state law,[32] it does not follow that state officials cannot be sued in federal court based on violations of federal law. The Eleventh Amendment does not bar this court from ensuring, via prospective injunctive relief, that the residents of Massachusetts are not deprived of their

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[29] SJC's Opp'n at 4; *see Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984).

[30] SJC's Opp'n at 1; *see* Mem. of City of Boston at 2-4.

[31] SJC's Opp'n at 6 n.7; *see* Mem. of City of Boston at 6-8.

[32] *See Pennhurst State Sch. & Hosp.*, 465 U.S. at 106.

federally guaranteed right to a republican form of government. Third, the deprivation of the right to a republican form of government, that is, the injury that Plaintiffs have alleged in this case, is sufficient to establish standing. Moreover, there can be no question that the issuance of an order enjoining the enforcement of the *Goodridge* decision would serve to redress that injury.[33] And fourth, the United States Supreme Court, in *New York v. United States*, refused to embrace "[t]he view that the Guarantee Clause implicates only non-justiciable political questions . . . ."[34] In fact, the Court recognized that it had previously "suggested that perhaps not all claims under the Guarantee Clause present non[-]justiciable political questions."[35] In view of all of the above, this court will proceed under the assumption that it has subject matter jurisdiction over this action.

The heart of the inquiry as to whether Plaintiffs are entitled to the injunctive relief that they seek is whether they

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[33] At the very least, the issuance of such an order would be the first step in redressing the constitutional injury that Plaintiffs have identified.

[34] 505 U.S. 144, 184 (1992).

[35] *Id.* at 185 (citing *Reynolds v. Sims*, 377 U.S. 533, 582 (1964) ("[S]ome questions raised under the Guarantee Clause are non[-]justiciable.")). The Court has also recognized that "[c]ontemporary commentators have . . . suggested that courts should address the merits of [Guarantee Clause] claims, at least in some circumstances." *Id.*

are likely to succeed on the merits.[36] Plaintiffs insist that the *Goodridge* court violated the separation of powers established in the Massachusetts constitution and, therefore, violated the federal Constitution's Guarantee Clause in two ways: (1) in hearing the *Goodridge* case, and (2) in redefining the term marriage.[37] Again, this court disagrees.

First, the SJC did not "lack[] subject matter jurisdiction to . . . hear the [*Goodridge*] case,"[38] even though the case "called for a redefinition of [the term] marriage."[39] To be sure, the Massachusetts Constitution gives the political branches, not the judicial branch, jurisdiction over all cases involving marriage, divorce, and alimony: "All causes of marriage, divorce, and alimony, and all appeals from the Judges of probate shall be heard and determined by the Governor and Council, until the Legislature shall, by law, make other provision."[40] But, as the preceding passage makes clear, the Constitution also provides a mechanism through which the Legislature can transfer subject matter jurisdiction in all cases involving marriage, divorce, and alimony.[41] And, the

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[36] *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221, 1225 (1st Cir. 1993).

[37] Pls.' Mem. at 2.

[38] *Id.* at 13.

[39] *Id.* at 16.

[40] *Id.* at 13 (citing Mass. Const. pt. 2, ch. III, art. V).

[41] *See id.*

Legislature has, in fact, transferred subject matter jurisdiction to the judicial branch "in cases involving divorce, alimony, affirmation,[42] and annulment."[43]

Implicit in that transfer of jurisdiction to the judicial branch is the transfer of authority to define the term marriage, as that terms appears in the Massachusetts Constitution. There can be no question that, if the judicial branch has jurisdiction over all questions involving divorce, alimony, affirmation, and annulment, it has the authority to determine whether there has been a valid marriage. And, in order to determine whether there has been a valid marriage, the judicial branch must have the authority to interpret, and if necessary, reinterpret, the term marriage. It is, therefore, immaterial that "there has been no statute or provision by the Legislature granting jurisdiction to the court to hear a case which concerns the definition of marriage in the Commonwealth."[44] It is similarly immaterial that "there [has not] been any general grant of jurisdiction

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[42] An affirmation is a legal declaration that the marriage in question is valid. *See* Mass. Gen. Laws ch. 207, § 14 ("If the validity of a marriage is doubted, either party may institute an action for annulling such marriage, or if it is denied or doubted by either party, the other party may institute an action for affirming the marriage. . . . Upon proof of the validity or nullity of the marriage, it shall be affirmed or declared void by a judgment of the court.").

[43] Pls.' Mem. at 13-14 (citing 1785 Mass. Acts 69; Mass. Rev. Stat. 76, §§ 3, 4 (1836)).

[44] *Id.* at 14.

concerning all causes of marriage to any court."[45] The SJC had the authority to hear the *Goodridge* case.

Second, the SJC did not usurp the power of the Massachusetts Legislature in violation of the Guarantee Clause, when it "reformulat[ed]" the term marriage to mean "the voluntary union of two persons as spouses, to the exclusion of all others."[46] The SJC has the authority to interpret, and reinterpret, if necessary, the term marriage as it appears in the Massachusetts Constitution. The SJC's reformulation of the term marriage in its opinion in the *Goodridge* case was, therefore, not a legislative act. Rather, it was a legitimate exercise of that court's authority and responsibility to decide with finality all issues arising under the Massachusetts Constitution.

Of significance as well is the fact that, after it reformulated the term civil marriage, the SJC announced that the "[e]ntry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate . . . ."[47] The Legislature was, therefore, provided with an opportunity to act before entry of judgment.

Because "the '*sine qua non* of [both the preliminary injunction and temporary restraining order standard] is

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[45] *Id.*

[46] *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 969 (Mass. 2003).

[47] *Id.* at 970.

whether the plaintiffs are likely to succeed on the merits,"[48] and because this court has determined that Plaintiffs are unlikely to succeed on the merits, it is unnecessary to consider the remaining elements of the quadripartite injunction standard.

Conclusion

Plaintiffs seek to have this court declare that Defendant SJC usurped the power of the Massachusetts Legislature and, in so doing, violated the federal Constitution, both when it heard the *Goodridge* case, which called for a redefinition of the term marriage, and when it redefined that term. But, it is the exclusive function of the judicial branch, and ultimately, of Defendant SJC, to decide issues that arise under the Massachusetts Constitution. And, there can be no question that the meaning of the term marriage is an issue that arises under that Constitution. To rule that, through its actions in the *Goodridge* case, Defendant SJC usurped the power of the Massachusetts Legislature and violated the federal Constitution would be to deprive that court of its authority and obligation to consider and resolve, with finality, Massachusetts constitutional issues.

Plaintiffs' motion for preliminary and permanent injunctive relief, declaratory relief, and a temporary restraining order is, therefore, DENIED.

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[48] *Gately v. Commonwealth of Massachusetts*, 2 F.3d 1221, 1225 (1st Cir. 1993) (quoting *Weaver v. Henderson*, 984 F.2d 11, 12 (1st Cir. 1993)) (alteration in original).

AN ORDER WILL ISSUE.

/S/ Joseph L. Tauro
United States District Judge

APPENDIX D

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 04-10921-JLT

ROBERT P. LARGESS, REP. MARK J. CARRON, REP. EMILE J. GOFUEN, REP. ROBERT S. HARGRAVES, REP. PETER J. LARKIN, REP. JAMES R. MICELI, REP. PHILIP TRAVIS, SEN. STEVEN C. PANAGIOTAKOS, REP. CHRISTOPHER P. ASSELIN, REP. EDWARD G. CONNOLLY, REP. JOHN A. LEPPER, REP. ELIZABETH A. POIRIER,

Plaintiffs,

v.

SUPREME JUDICIAL COURT FOR THE STATE OF MASSACHUSETTS, CHIEF JUSTICE MARGARET MARSHALL, JUSTICE ROBERT J. CORDY, JUSTICE JUDITH A. COWIN, JUSTICE JOHN M. GREANEY, JUSTICE RODERICK L. IRELAND, JUSTICE MARTHA B. SOSMAN, JUSTICE FRANCIS X. SPINA, in their official capacities as Justices of the Supreme Judicial Court of Massachusetts, MASSACHUSETTS DEPARTMENT OF PUBLIC HEALTH,

CHRISTINE C. FERGUSON, in her official capacity as Commissioner of the Massachusetts Department of Public Health, JUDY A. McCARTHY, in her official capacity as City Registrar for the City of Boston, CITY AND TOWN CLERKS 1-350,

Defendants.

MEMORANDUM
May 13, 2004

TAURO, J.

This court hereby orders that:

1. Plaintiff's Renewed Motion for Declaratory Relief, Temporary Restraining Order, and Preliminary and Permanent Injunctive Relief [#29] is DENIED.

IT IS SO ORDERED

/S/ Joseph L. Tauro
United States District Judge

APPENDIX E

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

Civil Action No. 04-10921-JLT

ROBERT P. LARGESS, REP. MARK J. CARRON, REP. EMILE J. GOFUEN, REP. ROBERT S. HARGRAVES, REP. PETER J. LARKIN, REP. JAMES R. MICELI, REP. PHILIP TRAVIS, SEN. STEVEN C. PANAGIOTAKOS, REP. CHRISTOPHER P. ASSELIN, REP. EDWARD G. CONNOLLY, REP. JOHN A. LEPPER, REP. ELIZABETH A. POIRIER,

Plaintiffs,

v.

SUPREME JUDICIAL COURT FOR THE STATE OF MASSACHUSETTS, CHIEF JUSTICE MARGARET MARSHALL, JUSTICE ROBERT J. CORDY, JUSTICE JUDITH A. COWIN, JUSTICE JOHN M. GREANEY, JUSTICE RODERICK L. IRELAND, JUSTICE MARTHA B. SOSMAN, JUSTICE FRANCIS X. SPINA, in their official capacities as Justices of the Supreme Judicial Court of Massachusetts, MASSACHUSETTS

DEPARTMENT OF PUBLIC HEALTH, CHRISTINE C. FERGUSON, in her official capacity as Commissioner of the Massachusetts Department of Public Health, JUDY A. McCARTHY, in her official capacity as City Registrar for the City of Boston, CITY AND TOWN CLERKS 1-350,

Defendants.

ORDER
May 17, 2004

TAURO, J.

This court hereby orders that:

1. The Motion for Preliminary Injunction and Temporary Restraining Order [#2] is DENIED AS MOOT;
2. The Motion for Waiver of Posting a Security Bond in Obtaining a Temporary Restraining Order and a Preliminary Injunction [#5] is DENIED AS MOOT;
3. The Oral Motion to Amend the Complaint that was made in open court on May 12, 2004 is ALLOWED;
4. The Supreme Judicial Court and Justices' Motion to

Dismiss Amended Complaint for Lack of Subject Matter Jurisdiction [#44] is DENIED;

5. The Motion of Hillary Goodridge and Julie Goodridge, David Wilson and Robert Compton, Michael Horgan and Edward Balmelli, Maureen Brodoff and Ellen Wade, Gary Chalmers and Richard Linnell, Heidi Norton and Gina Smith, and Gloria Bailey and Linda Davies for Leave to Intervene as Defendants and Incorporated Memorandum of Law in Support Thereof [#46] is ALLOWED; and

6. The Motion for Leave to File a Reply to Supreme Judicial Court and Justices' Opposition to Plaintiff's Motion for a Temporary Restraining Order and in Support of Court and Justices' Motion to Dismiss [#49] is ALLOWED.

IT IS SO ORDERED.

/S/ Joseph L. Tauro
United States District Judge

APPENDIX F

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

No. 04-1621

ROBERT P. LARGESS, ET AL.,
Plaintiffs, Appellants,

v.

SUPREME JUDICIAL COURT FOR THE STATE OF MASSACHUSETTS, ET AL.,
Defendants, Appellees.

Before
Boudin, Chief Judge,
Lipez and Howard, Circuit Judges.

ORDER OF COURT

Entered: May 14, 2004

Before us is a motion by appellants for interim relief pending appeal and for expedited consideration of the appeal. The relief requested is an injunction enjoining the implementation of the decision of the Massachusetts Supreme Judicial Court in *Goodridge v. Department of Public Health*, 798 N.E.2d 941 (Mass. 2003), and the issuance or recording of marriage licenses to same-sex couples.

We deny the request for an injunction pending appeal but

will hear the case on an expedited basis as set forth below.

On May 13, 2004, the district court denied preliminary injunctive relief and an appeal may be taken from such an order under 28 U.S.C. § 1292 (2000). A federal court may preserve the status quo pending appeal or grant other forms of interim relief, but this ordinarily requires a showing of likelihood of success as well as a balance of equities and public interest considerations tipping in favor of such relief. *Coalition for Basic Human Needs v. King*, 654 F.2d 838, 842-43 (1st Cir. 1981) (per curiam). In this instance, the showing so far made as to likelihood of success is not sufficient to justify interim relief.

The central claim made by appellants is that the *Goodridge* decision erroneously interprets the Massachusetts Constitution and state law by appropriating to the court authority reserved to the legislature and, in consequence, violates article IV, § 4, of the United States Constitution guaranteeing to the states a republican form of government. For much of its history the Supreme Court has treated almost all claims under article IV, § 4, as non-justiciable political questions, *see New York v. United States*, 505 U.S. 144, 183-85 (1992) (collecting cases); *Baker v. Carr*, 369 U.S. 186, 223-24 (1962), and while in recent years a few decisions suggest that the Court might alter its approach, *e.g.*, *New York*, 505 U.S. at 185, one might expect that to occur only in an extreme case.[1]

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[1] A closely related question is who would have standing to bring such a suit and whether the appellants in this case satisfy such a requirement.

Further, appellants would also have to show not only that the state's highest court had in this instance misconstrued state law but, in addition, that a federal court should disregard the longstanding practice of federal courts to treat the decisions of the highest state courts as controlling interpretations of state law. *Johnson v. Fankell*, 520 U.S. 911, 916 (1997); *Forysyth v. City of Hammond*, 166 U.S. 506, 518-20 (1897) ("settled decisions" of the state's highest courts "regarded as authoritative by the courts of the United States") (citations omitted).

Finally, assuming that this barrier too were overcome, *Goodridge* does not establish permanent martial law or declare the Commonwealth a monarchy; and it cannot plausibly be argued that every disagreement about allocation of power within a state government--even a very important disagreement--raises a question under article IV, § 4. That this disagreement is important is obvious; but, at least so far, it is not obvious why its resolution one way rather than another threatens a republican form of government.

Other legal objections have been made by opponents of appellants' request for an injunction, but what has been said above is sufficient for present purposes. The request for injunctive relief pending appeal is denied but the appeal will be expedited. The appellants' opening brief must be filed and received by May 21, 2004; the appellees' brief must be filed and received by May 28, 2004; and the case will be assigned for argument during the court's sitting week which begins on June 7, 2004.

It is so ordered.

By the Court:

Richard Cushing Donovan, Clerk

By: LYNNE ALIX MORRISON
Appeals Attorney.

APPENDIX G

(ORDER LIST: 541 U.S.)

FRIDAY, MAY 14, 2004

ORDER IN PENDING CASE

03A936 LARGESS, ROBERT P., ET AL. V. SUPREME COURT OF MA, ET AL.

The application for an injunction pending appeal presented to Justice Souter and by him referred to the Court is denied.

Supreme Court, U.S.
FILED
OCT 26 2004
OFFICE OF THE CLERK

NO. 04-420

IN THE

Supreme Court of the United States

ROBERT P. LARGESS, ET AL.,

Petitioners,

v.

SUPREME JUDICIAL COURT FOR THE STATE OF MASSACHUSETTS, ET AL.,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

RESPONDENT, JUDITH A. McCARTHY'S OPPOSITION

MERITA A. HOPKINS
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Dated: October 26, 2004

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

I. Whether Petitioners have standing to bring suit given their lack of injury.

II. Whether, in reviewing the state's marriage license laws under the state Constitution, the Commonwealth of Massachusetts highest court violated Article IV, § 4, of the United States Constitution.

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1 L. TRIBE, AMERICAN CONSTITUTIONAL LAW, 910 (3RD ED. 2000) 6

STATEMENT OF THE CASE

A. BRIEF DESCRIPTION OF THE CASE

On November 18, 2003, the Supreme Judicial Court of Massachusetts held that barring an individual from the protections, benefits and obligations of civil marriage solely because that person would marry a person of the same sex violates the Massachusetts Constitution. *Goodridge* v. *Dep't of Pub. Health*, 798 N.E.2d 941, 948 (Mass. 2003). The *Goodridge* Court stayed entry of judgment for 180 days to allow the Massachusetts Legislature to take any actions it deemed appropriate. *Id.*, at 970.

B. PROCEDURAL HISTORY AND DISPOSITION

On May 11, 2004, Petitioners Robert P. Largess, Rep. Mark J. Carron, Rep. Emile J. Goguen, Rep. Robert S. Hargraves, Rep. Peter J. Larkin, Rep. James R. Miceli, Rep. Phillip Travis, Sen. Steven C. Panagiotakos, Rep. Christopher P. Asselin, Rep. Edward G. Connolly, Rep. John A. Lepper, Rep. Elizabeth A. Poirier (hereinafter, Petitioners), filed an amended complaint seeking preliminary and permanent injunctive relief, declaratory relief, and a temporary restraining order against the Supreme Judicial Court Justices; the Department of Public Health; Christine C. Ferguson, Commissioner of the Massachusetts Department of Public Health; Judith A. McCarthy, City Registrar for the City of Boston; and the City and Town Clerks 1-350 (hereinafter "Respondents").

In moving for a preliminary injunction, the Petitioners contended that the SJC violated the separation of powers established in the Massachusetts constitution, thus violating the United States Constitution's Guarantee Clause by hearing the

Goodridge case and redefining the term marriage. Respondent Judith A. McCarthy, in her official capacity as City Registrar for the City of Boston, argued that the District Court should deny the Petitioners' motion for a preliminary injunction on the grounds that the District Court lacked jurisdiction and that the Petitioners suffered no actual injury and hence were without standing. Additionally, Respondent McCarthy challenged Petitioners' Guarantee Clause claim, as a nonjusticiable political question.

The District Court heard the Petitioners' motion on May 12, 2004. On the next day, May 13, 2004, the District Court denied the Petitioners' motion. The District Court rejected the Petitioners' arguments, finding that the Massachusetts Legislature transferred subject matter jurisdiction to the judicial branch in cases involving marital disputes, including matters concerning the validity of a marriage. Further, the District Court found the Supreme Judicial Court's interpretation of the term 'marriage' was "a legitimate exercise of that court's authority and responsibility to decide with finality all issues arising under the Massachusetts Constitution." *Largess* v. *Supreme Judicial Court for the State of Massachusetts*, C.A. No. 04-10921-JLT (May 13, 2004) p. 10.

The Court of Appeals for the First Circuit denied Petitioners' Request for an injunction pending appeal on May 14, 2004, on the ground that the Petitioners' showing so far as to likelihood of success was not sufficient to justify interim relief. The Court of Appeals for the First Circuit later affirmed the district court's denial of injunctive and declaratory relief, on the grounds that the Massachusetts Supreme Judicial Court's resolution of the same-sex marriage issue, subject to override by the voters through the state constitutional amendment process, did not plausibly

constitute a threat to a republican form of government. Accordingly, the Court held there was no basis for a federal court to interfere with the state governmental structure. *Largess* v. *Supreme Judicial Court for the State of Massachusetts*, (1st Cir. 2004), June 29, 2004.

ARGUMENT

I. PETITIONERS LACK STANDING TO BRING SUIT GIVEN THEIR LACK OF INJURY.

Petitioners lack standing to challenge the enforcement of the Supreme Judicial Court's ruling in *Goodridge* v. *Department of Public Health*, 440 Mass. 309 (2003). Thus, the Court of Appeals for the First Circuit appropriately denied Petitioners' request for an injunction. "If a party lacks standing to bring a matter before the court, the court lacks jurisdiction to decide the merits of the underlying case." *United States* v. *AVX Corp.*, 962 F.2d 108, 114 (1st Cir. 1992).

Article III of the United States Constitution limits federal jurisdiction to deciding only actual cases and controversies. *Allen* v. *Wright*, 468 U.S. 737, 750, 82 L. Ed. 556, 104 S. Ct. 3315 (1984). Accordingly, the standing doctrine establishes a threshold inquiry in every federal case, asking "whether the plaintiff has 'alleged such a personal stake in the outcome of the controversy' as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf." *Warth* v. *Seldin*, 422 U.S. 490, 498-99, 45 L.Ed. 2d 343, 95 S.Ct. 2197 (1975).

To establish standing, Petitioners must show (1) that they personally have suffered some actual or threatened injury as a result of the Respondents' putatively illegal conduct; (2) that the injury fairly can

be traced to the challenged action; and (3) that they are likely to be redressed by a favorable decision. *American Postal Workers Union, et al.* v. *Anthony M. Frank*, 968 F.2d 1373 (1st Cir.) (1992) (citing *Valley Forge Christian College* v. *Americans United for Separation of Church and State*, 454 U.S. 464, 472, 70 L. Ed. 2d 700, 102 S.Ct. 752 (1982)). In the instant case, Petitioners fail to pass the three threshold standing queries, and therefore, this Court should dismiss their complaint.

As to the first prong, requiring a showing of personal injury, neither the Petitioners' complaint nor their subsequent filings show any evidence suggesting the Petitioners will or have endured an actual injury as a consequence of the enforcement of the Supreme Judicial Court's *Goodridge* decision. In *Goodridge*, the Supreme Judicial Court held that the Commonwealth's ban on marriage between members of the same sex failed the rational basis test for both due process and equal protection under the Massachusetts Constitution. 440 Mass. 309.

On May 17, 2004, City and Town clerks began issuing marriage licenses to couples of the same sex in accordance with *Goodridge*. The Petitioners ask this Court to enjoin Respondent, Judith A. McCarthy in her official capacity as City Registrar for the City of Boston from executing the law. Petitioners fail to show -- and cannot show -- any evidence that they personally suffered an actual injury or threat of injury as a consequence of the enforcement of *Goodridge*.

Further, as this Court has held, the decision to seek review must be placed "in the hands of those who have a direct stake in the outcome." *Sierra Club* v. *Morton*, 405 U.S. 727, 740, 31 L.Ed. 2d 636, 92 S.Ct. 1361 (1972). Deeply felt interest in the outcome of a case does not constitute an actual injury under the

standing doctrine, and the decision to seek review is not to be placed in the hands of "concerned bystanders," who will use it simply as a vehicle for the vindication of value interests." *United States* v. *SCRAP*, 412 U.S. 669, 687, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). The Petitioners lack standing to bring their suit because they cannot show they have suffered or will suffer the requisite injury.

Read liberally, the only possible "injury" Petitioners have suffered, according to their filings, is the consequence of judicial review: a well-established principle since *Marbury* v. *Madison*, 5 U.S. (Cranch) 137 (1803). In fact, the *Goodridge* Court addressed this point eloquently, noting, "the history of constitutional law is the story of extension of constitutional rights and protections to people once ignored or excluded." *Id.* 798 N.E. 2d at 966. (citing *United States* v. *Virginia*, 518 U.S. 515, 557, 135 L.Ed. 735, 116 S.Ct. 2264 (1996)). To the extent that Petitioners are dissatisfied with the Commonwealth of Massachusetts highest court's interpretation of the state constitution, their redress is in the Massachusetts Legislature -- not the federal court.

Because Petitioners cannot meet the first prong of the standing test, this Court need not reach the second and third parts of the standing analysis. In any event, there is no question that Petitioners' filings fail to pass standing muster. Petitioners cannot show that their alleged injury can be fairly traced to the challenged conduct or that the injury likely will be redressed by a favorable decision from the court. For those reasons, the Respondent, Judith A. McCarthy in her Official Capacity as City Registrar for the City of Boston, asks this Court to deny Petitioners' petition for writ of certiorari on the grounds that they lack standing.

II. THE MASSACHUSETTS CONSTITUTION PROVIDES THE SUPREME JUDICIAL COURT WITH THE POWER TO REVIEW THE CONSTITUTIONALITY OF STATE STATUTES.

Assuming *arguendo* that a cognizable injury propels the Petitioners beyond the threshold question of standing, this Court should still deny their request for injunctive relief because their Guarantee Clause claim fails on the merits. Petitioners contend that their right to a republican form of government has been violated by the SJC's interpretation of the Massachusetts Constitution. However, the Supreme Court has never found that the Guarantee Clause of Article IV, § 4, of the United States Constitution confers rights upon ordinary individuals (like Appellants) who are dissatisfied with the outcome of the state's highest court's constitutional law decision. *See* 1 L. Tribe, American Constitutional Law, 910 (3rd ed. 2000).

As the First Circuit wisely noted in its denial of Petitioners' request for injunctive relief pending appeal:

> . . . Goodridge does not establish permanent martial law or declare the Commonwealth a monarchy; and it cannot plausibly be argued that every disagreement about allocation of power within a state government – even a very important disagreement – raises a question under Article IV, § 4. That this disagreement is important is obvious; but, at least so far, it is not obvious why its resolution one way rather than another threatens a republican government.

Largess v. *Supreme Judicial Court for the State of Massachusetts*, (1st Cir.) May 14, 2004.

Accordingly, as the Court of Appeals for the First Circuit has already held, the *Goodridge* decision did not restructure the Commonwealth's form of government, neither did it change the balance of power allocated to the three branches of government pursuant to the Massachusetts Constitution. Rather, as the district court judge reasoned, "The SJC has the authority to interpret, and reinterpret, if necessary the term marriage as it appears in the Massachusetts Constitution." *Largess* v. *Supreme Judicial Court For the State of Massachusetts*, C.A. No. 04-10921-JLT, (May 13, 2004) p. 10. There is simply no evidence to support Petitioners' contention that their Guarantee Clause rights have been violated. In fact, the evidence of record as to the conduct of the Legislative, Judicial and Executive branches of government illustrates the careful balance of power contemplated and allocated by the constitutional framers. The notion that Petitioners' right to a republican form of government has somehow been impeded by the SJC's interpretation of the state constitution is unsupported by the evidence or the principles of judicial review.

There can be no dispute that the Massachusetts Supreme Judicial Court has the power and the authority to review legislation under the state constitution. Further, the federal district courts are precluded from exercising subject matter jurisdiction over issues of state constitutional law. *District of Columbia Court of Appeals* v. *Feldman*, 460 U.S. 462, 476 (1983).

Thus, as the Massachusetts Supreme Judicial Court is the final arbiter of the state Constitution, the federal court cannot review the SJC's *Goodridge*

decision on the merits.[1] There has been no violation of the Petitioners' rights to a republican form of government, and their request for injunction should be denied.

CONCLUSION

Wherefore, Respondent, Judith A. McCarthy, acting in her Official Capacity as the City Registrar for the City of Boston, asks this Court to deny Petitioners' request for injunctive relief as they lack standing and they have failed to show any violation of the Guarantee Clause of the United States Constitution.

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[1] Petitioners seek injunctive relief and no damages against Respondent McCarthy acting in her official capacity as City Registrar for the City of Boston. However, to the extent Petitioners could make out a claim against Respondent McCarthy for damages, she is fully protected by qualified immunity. The principle of qualified immunity provides that "[g]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow* v. *Fitzgerald*, 457 U.S. 800, 818 (1982).

Respectfully submitted,

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(3)

NO. 04-420

IN THE

Supreme Court of the United States

ROBERT P. LARGESS, ET AL.,
Petitioners,

v.

SUPREME JUDICIAL COURT FOR THE
STATE OF MASSACHUSETTS, et al.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION FOR THE STATE RESPONDENTS

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Questions Presented

Whether the District Court properly denied petitioners' request for a preliminary injunction against enforcement of the decision of the Supreme Judicial Court of Massachusetts in *Goodridge v. Department of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), including the questions:

1. Whether petitioners' Guarantee Clause claim is entirely dependent on claims of state law error, and thus is essentially an impermissible attempt to obtain federal court review of a state court's decision on a matter of state law;

2. Whether a Guarantee Cause claim by an individual against a State is justiciable;

3. If such a claim is justiciable, whether petitioners allege any concrete injury to themselves sufficient to confer standing to maintain such a claim; and

4. Even if such a claim is justiciable and petitioners have standing, whether the claim fails on its merits because *Goodridge* leaves fully intact the ultimate control of the people of the Commonwealth over their government and their laws – including control of whether same-sex marriage should be permitted in the Commonwealth.

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Pursuant to United States Supreme Court Rule 15, the state respondents submit this brief in opposition to the petition for a writ of certiorari filed by Robert P. Largess, *et al.*, who were plaintiffs and appellants below.

Opinions Below

The opinion of the United States Court of Appeals for the First Circuit is reported a 373 F.3d 219 (1st Cir. 2004) and is reproduced in the Appendix to the Petition for a Writ of Certiorari ("Pet. App.") at 1a-19a. The opinion of the District Court for the District of Massachusetts denying plaintiffs' motion for a preliminary injunction is reported at 317 F.Supp.2d 77 (D. Mass. 2004) and is reproduced at Pet. App. 20a-35a. The opinion of the Court of Appeals denying plaintiffs' motion for an injunction pending appeal is unreported but reproduced at Pet. App. 41a-43a. The order of the United States Supreme Court dated May 14, 2004, denying petitioners' injunction pending appeal is reported at 124 S.Ct. 2157 (2004) and reproduced at Pet. App. 45a.

Jurisdiction

Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1). Regarding Questions 3, 4, and 5 presented by the petition, the respondents state that this Court lacks jurisdiction to review the question whether the Massachusetts Supreme Judicial Court correctly interpreted and applied Massachusetts law in *Goodridge v. Dept. of Public Health*, 440 Mass. 309, 798 N.E.2d 941 (2003), because the question is one of state, not federal law.

Facts and Prior Proceedings

For purposes of this Brief in Opposition to the Petition for a Writ of Certiorari, the state respondents accept and incorporate by reference the statement of facts and prior proceedings set forth in the decision of the United States Court of Appeals for the First Circuit (Pet. App. 2a-6a.) with the exception of the statements that the judgment and related orders and opinions of the Supreme Judicial Court require that the Commonwealth "recognize" the marriage of same-sex couples: the proper characterization of these holdings is that they require the Commonwealth to allow such marriages on the same terms available to opposite-sex couples.[1]

Constitutional Provision Involved

The Guarantee Clause of Art. IV, § 4, of the United States Constitution provides:

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[1] The state defendant-respondents are the Justices of the Supreme Judicial Court in their official capacities, the Massachusetts Department of Public Health (the Department), and the Commissioner of the Massachusetts Department of Health (the Commissioner) in her official capacity. Pet. App. 1a. The Department and the Commissioner were presumably named as defendants because each is an agency or official with responsibility to implement the judgment of the Supreme Judicial Court in *Goodridge*. In light of the secondary role of the Department and the Commissioner in petitioners' current challenge to the decision of the Supreme Judicial Court, the respondents intend to move to dismiss the Department and the Commissioner from the case or have them designated as nominal parties.

> The United States shall guarantee to every State in this Union a Republican Form of Government, and shall protect each of them against Invasion; and on Application of the Legislature, or of the Executive (when the Legislature cannot be convened) against domestic violence.

Reasons for Denying the Writ

Pursuant to United States Supreme Court Rule 10, "[r]eview on a writ of certiorari is not matter of right, but of judicial discretion." The purpose of certiorari jurisdiction is to limit the docket of the Court to cases "of such gravity and general importance" as to warrant plenary review. *In re Woods*, 143 U.S. 202, 206 (1892). For the reasons stated below, the petition does not present a federal question that satisfies the criteria for certiorari review.

I. THE INTERLOCUTORY NATURE OF THE CHALLENGED ORDER DENYING PRELIMINARY RELIEF COUNSELS AGAINST REVIEW BY CERTIORARI.

While the Court has jurisdiction to review interlocutory judgments of the courts of appeals under 28 U.S.C. § 1254(1), it does not ordinarily grant such review. *American Construction Co. v. Jacksonville, T. & K.W. Railway* Co., 148 U.S. 372, 384 (1893). The interlocutory nature of the order at issue may "of itself alone" furnish "sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Here, petitioners seek review of the order of the District Court denying preliminary relief. No final judgment has been entered by the District Court. There may be further proceedings there. Petitioners cite no circumstances that would justify plenary review at this stage of the proceedings. In these circumstances, the Court should deny plenary review.

II. THE PETITION SEEKS TO DRAW FEDERAL COURTS INTO REVIEWING DECISIONS OF A STATE'S HIGHEST COURT ON MATTERS OF STATE CONSTITUTIONAL LAW.

Petitioners argue that the Supreme Judicial Court "exceeded its powers when it heard the *Goodridge* case" and "violated the separation of powers by improperly using a judicial decision to amend the Massachusetts Constitution." Pet. 25. These violations, say the petitioners, violated their rights under the Guarantee Clause of the United States Constitution. Pet. 29. Thus, petitioners' federal claim, as they themselves repeatedly frame it, is wholly dependent on establishing that the Massachusetts Constitution means something other than what the Supreme Judicial Court has already ruled that it means.

This Court should be extremely leery of being drawn into considering the merits of such a claim, given the obvious potential it creates for friction between federal and state courts and consequent damage to established policies of comity and federalism. The Guarantee Clause was never intended to furnish a vehicle for federal court review of state court decisions. This Court should not open the door to such claims now. A variety of rules and doctrines serve to prevent such a result, including the rule that a state's highest court's decisions on issues of state law

are conclusive on the federal courts; the policies underlying the *Rooker- Feldman* doctrine; the Eleventh Amendment; Article III standing requirements; and the non-justiciability of individuals' Guarantee Clause claims against their States. This Court should deny the petitioners' attempt to turn the Guarantee Clause into a vehicle for embroiling federal courts in second-guessing states' highest courts on any decision of state constitutional law (or, indeed, on any issue of state law) with which any citizen might disagree.

A. The Decision of a State's Highest Court on a Matter of State Constitutional Law is Binding on the Federal Courts.

Petitioners' focus on the Supreme Judicial Court's supposed errors of law is misplaced, because, as the Court of Appeals noted, federal courts generally "treat the decisions of the highest state courts as controlling interpretations of state law." Pet App. 6a (citing *Johnson v. Fankell*, 520 U.S. 911, 916 (1997) (other citations omitted)). "The proposition [is] fundamental to our system of federalism[.]" *Johnson*, 520 U.S. at 916.

Petitioners allege that the Supreme Judicial Court violated the separation of powers provision of the Massachusetts Constitution by (1) exercising jurisdiction over the *Goodridge* case in the first place and (2) assertedly redefining marriage in a way that only the Legislature may do. Pet. 22-29. The first argument was expressly rejected in the Supreme Judicial Court's May 7, 2004, unanimous *per curiam* order, as well as by implication from the fact that the argument had earlier been presented to the Supreme Judicial Court in an *amicus* brief yet the court found no need even to comment upon it. The second argument was rejected by the

Goodridge majority opinion, and a variant of the argument (that the mention of marriage in the Massachusetts Constitution of 1780 somehow constitutionalized the definition of marriage) was rejected by Justice Spina, one of the dissenters from the main *Goodridge* decision.

Although petitioners, virtually ignoring the Supreme Judicial Court's actual rulings on these issues, go on to assert that the alleged violations of the state Constitution were also a violation of the federal Guarantee Clause, it is clear that at bottom petitioners complain solely of errors of state law and that their Guarantee Clause claim is wholly derivative of those claimed errors. But the only issue even conceivably open here is exceedingly narrow: whether the Massachusetts Constitution itself, as authoritatively construed by the Supreme Judicial Court, violates the Guarantee Clause.

Even that issue appears to be foreclosed, at least in these circumstances. In *Forsyth v. Hammond*, 166 U.S. 506 (1897), a state supreme court's decision concerning municipal boundaries was challenged on state separation of powers grounds as intruding on the state legislature's powers; the Court rejected the notion that such a state court decision might violate the Guarantee Clause. Id. at 515-16, 518-20. The Court said:

> It may be true that the general rule is that the determination of the territorial boundaries of a municipal corporation is purely a legislative function, but *there is nothing in the federal constitution to prevent the people of a state from giving, if they see fit, full jurisdiction over such matters to the courts and taking it entirely away from the legislature.* The preservation of

> legislative control in such matters is not one of the essential elements of a republican form of government which, under section 4 of article 4 of the constitution, the United States are bound to guaranty to every state in this Union; and, whenever the supreme court of a state holds that under the true construction of its constitution and statutes the courts of that state have jurisdiction over such matters, the federal courts can neither deny the correctness of this construction nor repudiate its binding force as presenting anything in conflict with the federal constitution.

Id. at 519 (emphasis added). *See also In re Duncan*, 139 U.S. 449, 460-62 (1891) (question whether state statute had been properly enacted in accordance with state constitution was matter for final determination of state courts and raised no question under Guarantee Clause); *Highland Farms Dairy, Inc. v. Agnew*, 300 U.S. 608, 612-13 (1937) (claim that state statute delegated legislative power to agency in violation of state constitution had already been rejected by state's highest court, whose decision on that issue was controlling; statute did not violate Guarantee Clause, and even if it did, Clause was not judicially enforceable). Similarly, in this case, petitioners' claim under the Guarantee Clause reduces to a claim that the decision of the Supreme Judicial Court violated the Massachusetts Constitution. This claim does not present a federal issue within the jurisdiction of this Court.

B. The Policies Underlying the *Rooker-Feldman* Doctrine Support the Denial of the Preliminary Injunction by the District Court.

The *Rooker-Feldman* doctrine is a further factor demonstrating the lack of jurisdiction in the District Court to review the Supreme Judicial Court's decisions on issues of state constitutional law. Although *Rooker-Feldman* may not necessarily apply where the plaintiff in the federal action was not a party to the state action, *e.g., Schneider v. Colegio de Abogados de Puerto Rico*, 917 F.2d 620, 629 & n.11 (1st Cir. 1990), the policies underlying *Rooker-Feldman* are directly applicable the District Court. The doctrine holds that the lower federal courts have no appellate jurisdiction to review decisions of state courts, even where it is alleged that the state court decision was unconstitutional. *District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462, 486 (1983).

> The *Rooker-Feldman* doctrine precludes [federal district] courts from exercising subject matter jurisdiction where the issues presented in the case are 'inextricably intertwined' with questions previously adjudicated by a state court, such that the federal district court would be in the unseemly position of reviewing a state court decision for error. *See Hill v. Town of Conway*, 193 F.3d 33, 39 (1st Cir. 1999) (noting that a federal claim is "inextricably intertwined" with a state-court claim "if the federal claim succeeds only to the extent that the state court wrongly decided the issues

before it.")[.]

Mills v. Harmon Law Offices, P.C., 344 F.3d 42, 44 (1st Cir. 2003) (citing *Feldman*; additional citations and footnote omitted). Here, petitioners directly challenge the decision of the Supreme Judicial Court and the Justices thereof on the basis that "the state court's action was unconstitutional," the very sort of claim *Feldman* itself said is barred. 460 U.S. at 486. The issues petitioners argue here are "inextricably intertwined" with questions previously adjudicated by the Supreme Judicial Court; petitioners' Guarantee Clause claim, as they themselves have framed it, "succeeds only to the extent that the state court wrongly decided the issues before it." *Mills*, 344 F.3d at 44 (citations and quotations omitted); *see Johnson v. DeGrandy*, 512 U.S. 997, 1005-06 (1994).

C. The Eleventh Amendment Casts Further Doubt on the Jurisdiction of the Court Below to Review A Claim Against a State Court under the State Constitution.

The futility of the claim below is further shown by the Eleventh Amendment, under which a federal court lacks jurisdiction to review state officials' compliance with state law or to order state officials to comply with state law. *Pennhurst State School & Hosp. v. Halderman*, 465 U.S. 89, 106 (1984). The courts below correctly denied the petitioners' attempt to evade this rule by wrapping their claims of state constitutional violations in the mantle of the Guarantee Clause.

Were it otherwise, virtually any question of a state official's compliance with state law--constitutional, statutory, regulatory, or common law--could be brought before the federal courts. A plaintiff could simply allege that the official's action somehow exceeded the bounds of the authority granted, either directly or indirectly, by the people, and thereby violated the Guarantee Clause. The Eleventh Amendment cannot be so easily defeated.

The central and indispensable premise of petitioners' Guarantee Clause claim here is that the Supreme Judicial Court exceeded its powers under the Massachusetts Constitution. Under the Eleventh Amendment, that is quintessentially a matter for the Supreme Judicial Court alone to adjudicate.

In light of all of the foregoing, the Supreme Judicial Court's decision that it had jurisdiction under the Massachusetts Constitution to decide the *Goodridge* case, and to hold that Massachusetts marriage statutes violated the Massachusetts Constitution, must be taken as a given, beyond review by any federal court. The sole question possibly within the jurisdiction of the federal courts would be whether the Massachusetts Constitution, *as so interpreted*, violates the Guarantee Clause. But even that issue is foreclosed by cases such as *Forsyth*, 166 U.S. at 519, *In re Duncan*, 139 U.S. at 460-62, and *Highland Farms Dairy*, 300 U.S. at 612-13, discussed in Arg. II.A, above. Therefore, the petition could be denied as well "for lack of subject-matter jurisdiction because of the inadequacy of the federal claim," because "the claim is 'so insubstantial, implausible, foreclosed by prior decisions of this Court, or otherwise completely devoid of merit as not to involve a federal controversy." *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 89 (1998) (citations and internal quotations omitted). At the least, these factors demonstrate why this case is not suitable

for plenary review.

III. THE COURT SHOULD NOT GRANT REVIEW OF THE JUSTICIABILITY OF PETITIONERS' CLAIMS BECAUSE (1) THEY DID NOT SUFFER AN ADVERSE JUDGMENT ON THAT ISSUE BELOW AND (2) THERE IS NO SIGNIFICANT SPLIT OF DECISIONS IN THE LOWER COURTS IN CASES BROUGHT BY INDIVIDUALS AGAINST STATES UNDER THE GUARANTEE CLAUSE.

Petitioners first argue that this Court should grant review because the "First Circuit and numerous state supreme courts are in conflict with the Second and Ninth Circuits on the issue of the justiciability of the Guaranty Clause." Pet. 8. This asserted conflict does not warrant review because (1) the petitioners did not suffer an adverse judgment on this issue in the Court of Appeals, (2) there is no significant conflict of authority on the issue whether a claim by *a private person against a State* is justiciable.

First, a party may not ordinarily seek review of a judgment – or a portion thereof – favorable to him. *See Forney v. Apfel*, 524 U.S. 266, 271 (1998). While a party may appeal a decision "granting in part and denying in part the remedy requested," *id.*, petitioners cite no case in which a party may appeal a portion of a judgment or opinion favorable to him.

In this case, the Court of Appeals did not hold that petitioners' complaint should be dismissed for lack of justiciability. Instead, it stated that "resolving the issue of justiciability in the Guarantee

Clause context may also turn on the resolution of the merits of the underlying claim." Pet. App. 8a, 9a. It then decided the merits of the case adversely to petitioners. Pet. App. 10a-18a. In these circumstances, petitioners lack standing to seek review of the question of justiciability. No judgment of this Court on the justiciability issue would improve their position. For this reason alone, the Court should deny review of this issue.

Second, this Court should deny review on this issue because three is no significant split of authority on the non-justiciability of a claim by a private person against a State under the Guarantee Clause. This Court has already made clear that Guarantee Clause claims brought by individuals challenging their state governments are non-justiciable. Such a claim was first found non-justiciable in *Luther v. Borden*, 48 U.S. (7 How.) 1 (1849), and since 1912, when non-justiciability was reaffirmed in *Pacific States Tel. & Tel. Co. v. Oregon*, 223 U.S. 118, 133 (1912), petitioners cite not a single case in which such a Guarantee Clause claim was found justiciable.

The Court has more recently suggested, without deciding, that "perhaps not all claims under the Guarantee Clause present non-justiciable political questions." *New York v. United States*, 505 U.S. 144, 183-86 (1992). The court cited various commentators, the first of whom was Professor Tribe, as supporting the view that "courts should address the merits of such claims, at least in some circumstances." Id. at 184, 185. But this must be read in light of the view actually expressed by Professor Tribe in the passage cited by the *New York* Court: that courts should enforce the Guarantee Clause in order to protect the *States* from *federal* interference, not to grant individuals the right to challenge state governmental forms. The Clause "recognizes in the National Government a duty, running directly 'to every state in this Union'

rather than to individuals, to respect the state's most fundamental structural choices as to how its people are to participate in its own governance[.]" L. Tribe, *American Constitutional Law* 398 (2d ed. 1988).

> To be sure, the Supreme Court has denied that the guaranty clause of article IV, § 4, confers judicially cognizable rights upon *individuals*. . . . [I]t need not follow from the unavailability of the guaranty clause as a textual source of protection for *individuals* that the clause confers no judicially enforceable rights upon *states as states*. It is, after all, the states to which the clause extends its explicit guarantee. If courts are once again to take up the task of preserving for states their constitutionally essential role as self-governing polities, the guaranty clause might well provide the most felicitous textual home for that enterprise.

Id. at 398 (emphasis in original; footnote omitted). *New York v. United States*, of course, involved exactly that sort of claim--a state seeking protection from the exercise of federal power. This case is entirely different--an attack by individuals to restrain what they claim, based on a single judicial decision, to be an impermissible form of state government.

Petitioners attempt to bolster their justiciability claim with the assertion that "[t]he Court, in *New York* stated that not all Guarantee Clause claims are non-justiciable " and that "[t]his was reaffirmed by" *Printz v. United States*, 521 U.S. 898 (1997)." Pet. 10. But *Printz*, too, was about a state seeking protection from exercises of federal power. Id. at 904-05. The Guarantee Clause was mentioned, once, as but one of many federal

constitutional provisions recognizing that "the Constitution established a system of dual sovereignty," federal and state. Id. at 918-19 (citations and internal quotations omitted). The Clause was described as "'presuppos[ing] the continued existence of the states and . . . those means and instrumentalities which are the creation of their sovereign and reserved rights.'" Id. at 919 (quoting *Helvering v. Gerhardt*, 304 U.S. 405, 414-415 (1938)). No mention was made of the Clause as a source of individual rights against states, and notwithstanding plaintiffs' further claim (Pet. 10) that *Printz* "reaffirmed" the *New York* Court's suggestion that not all Guarantee Clause claims were nonjusticiable, there was simply no discussion at all in *Printz* of the justiciability of Guarantee Clause cases.

The Court recently denied *certiorari* in circumstances similar to those present here. In *Guinn v. Legislature of the State of Nevada*, 71 P.3d 1269 (Nev. 2003), the Nevada Supreme Court, on petition of the governor, resolved a state constitutional dispute by issuing a writ of mandamus against the state legislature. Members of the state legislature sought certiorari, presenting the question as whether the state court's "effective nullification of a key, recently enacted structural provision of the Nevada State Constitution violates the Republican Guarantee Clause of Article IV of the United States Constitution." *See* Petition for Writ of *Certiorari* in *Angle v. Guinn*, No. 03-1037, 2004 WL 113601 (Jan. 20, 2004). This Court denied *certiorari* on March 22, 2004. *Angle v. Guinn*, 124 S. Ct. 1662 (2004). In light of the decisions of this Court on the issue of justiciability of private claims against States, the decisions of the lower courts cited by the petitioners do not establish a split of authority that warrants review by this

Court.[2]

IV. THE COURT SHOULD NOT GRANT REVIEW OF THE QUESTION OF STANDING BECAUSE (1) THE PETITIONERS DID NOT SUFFER AN ADVERSE JUDGMENT ON THAT ISSUE BELOW AND (2) THE ASSERTED SPLIT OF AUTHORITY ON THE ISSUE IS NOT SIGNIFICANT.

Next, petitioners assert a "conflict among the circuit courts on the issue of who has standing to bring a Guarantee Clause claim." Pet. 15 (emphasis added). This asserted conflict does not warrant review because (1) the petitioners did not suffer an adverse judgment on this issue in the Court of Appeals, (2) the cited split is in any event insignificant.

First, the Court of Appeals did not hold that petitioners lacked standing to maintain their complaint. Rather, it determined that the "circumstances of this case present a rare instance in which the standing issue is intertwined and inseparable from the merits

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[2] *O'Hair v. White*, 675 F.2d 680, 684 n.5 (5th Cir. 1982), and *Murtishaw v. Woodford*, 255 F.3d 926, 961 (9th Cir. 2001), cited by petitioners (Pet. 14), both rejected the justiciability of claims by individuals against state officials under the Guarantee Clause. The other state cases cited by the petitioners (Pet. 11-14) do not concern the justiciability of a private claim against the decision of a State court and do not support plenary review of such a claim.

of the underlying claim." Pet. App. 7a. "If the plaintiffs are correct that the Guarantee Clause extends rights to individuals in at least some circumstances, then the usual standing inquiry--which distinguishes between concrete injuries and injuries that are merely abstract and undifferentiated– might well be adjusted to the nature of the claimed injury." Pet. App. 7a-8a (citation omitted). The Court of Appeals rejected petitioners' Guarantee Clause claim on its merits. Pet. App. 10a-18a. These determinations do not make the petitioners an aggrieved party entitled to seek review of the question of standing in this Court.

Second, even if petitioners may seek review of the standing question, they have not demonstrated a split of authority that would merit such review. The Court may grant review where "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." United States Supreme Court Rule 10(a). Other than the decision of the First Circuit -- which did not dismiss their complaint for lack of standing to bring their claim -- petitioners cite merely a decision of the United States District Court, *Adams v. Clinton*, 90 F.Supp.2d 27, 33 (D.D.C. 2000), and an unpublished decision of the Court of Appeals for the Second Circuit, *Schulz v. Jennings*, 198 F.3d 234 (2d Cir. 1999), which affirmed an unpublished decision of the District Court for the Northern District of New York. The alleged "split" between these authorities does not support plenary review.

First, the "Court tries to achieve uniformity in federal matters only among the various courts whose decisions are otherwise final in the absence of Supreme Court review – the courts of appeals, other federal courts of the same stature, and the highest state courts in which decision may be had." R.L. Stern, *et al.*, *Supreme Court Practice* (8th ed.) 237. Decisions of district

courts do not ordinarily meet this standard. Reliance on the District Court opinion in *Adams* is particularly inapt here because the facts there – which concern an issue of governmental organization apparently unique to the District of Columbia–are not likely to recur.

Nor does the alleged split between the First and Second Circuits merit review. A conflict of decisions in the lower courts is ordinarily not reviewed by this Court unless it is "real and embarrassing.". *Rice v. Sioux City Cemetary*, 349 U.S. 70, 79 (1955) (quoting *Layne & Bowler Corp. v. Western Well Works, Inc.*, 261 U.S. 387, 393 (1923)). Citation to one unpublished decision does not demonstrate a conflict of authority worthy of plenary review.

V. THE DECISION OF THE COURT OF APPEALS PROPERLY INTERPRETS THE GUARANTEE CLAUSE AND DEMONSTRATES THAT THIS CASE PRESENTS AN INSUBSTANTIAL CLAIM THAT WOULD BE AN INAPPROPRIATE VEHICLE FOR CONSIDERATION OF THE CLAUSE.

Even assuming that petitioners' Guarantee Clause claim is justiciable and they have standing to maintain it, the Court of Appeals correctly rejected the claim. Once again, the only question open on a Guarantee Clause claim in this case would be not whether the Supreme Judicial Court was *correct* in interpreting the Massachusetts Constitution as requiring it to decide *Goodridge* as it did, and as granting it jurisdiction to decide *Goodridge* in the first place, but instead whether the

Massachusetts Constitution, *as so interpreted*, violates the Guarantee Clause. It plainly does not. In *Minor v. Happersett*, 88 U.S. (21 Wall.) 162, 175-76 (1874), the Court noted that the state governments in place when the Constitution was adopted were "presumed" to be consistent with the Guarantee Clause. The Commonwealth is one of those governments, and it is still operating under the Constitution of 1780, with amendments that, if anything, have increased popular control.[3] Petitioners cannot rebut the presumption that the Commonwealth is operating under a "republican form of government."

First and foremost, *Goodridge* does nothing to undermine the ultimate control of the people of the Commonwealth over their government and their laws. The people may still elect their legislators, the Governor, and other statewide constitutional exectuive officers; through their election of those constitutional officers, the people ultimately control appointments in the executive branch; and through their election of the Governor and Council (which confirms judicial appointments), the people ultimately control appointments in the judicial branch. All three branches of government remain under ultimate popular control. Merely alleging some violation of state separation of powers requirements does not make out a Guarantee Clause violation. *Forsyth*, 166 U.S. at 519; *Highland Farms Dairy*, 300 U.S. at 612.

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[3] *E.g.*, Mass. Const. amend. art. 22 (1857) (providing for popular election of state senators, superseding Mass. Const. pt. 2, c. 1, § 2, art. 1); id. amend. art. 48 (1918) (providing for popular initiative and referendum for statutes and constitutional amendments); id. amend. arts. 68, 69 (1924) (making women eligible to vote and hold public office).

Second, and particularly relevant here, the people have at their disposal, and have set in motion, a process for amending the Massachusetts Constitution. Mass. Const. amend. art. 48, Init., Pt. IV. On March 29, 2004, the people's elected representatives in the Legislature gave preliminary approval, by a vote of 105-92, to a constitutional amendment declaring, *inter alia*, that "only the union of one man and one woman shall be valid or recognized as a marriage in the commonwealth." If the 2005-2006 Legislature likewise approves the proposed amendment, it will be placed on the November 2006 ballot for the people's approval or rejection. Mass. Const. amend. art. 48, Init., pt. IV, §§ 2-5.

The drafters of Mass. Const. amend. art. 48 (1918) struck a delicate balance. They expressly recognized that the Supreme Judicial Court's power to review the constitutionality of state statutes--exactly the power it exercised in *Goodridge*--was itself sufficiently important to the functioning of government as to merit constitutional protection from direct popular attack. The drafters granted such protection by excluding measures relating to the "powers of courts" from the initiative process. *Mazzone v. Attorney General*, 432 Mass. 515, 526-27, 736 N.E.2d 358, 368-69 (2000) (citing 2 *Debates in the Massachusetts Constitutional Convention 1917-18* (1918)). At the same time, the drafters recognized that the constitutional amendment initiative process should be available to change the Constitution in response to a particular Supreme Judicial Court judgment, *i.e.*, "effectively, overrule a decision based on State constitutional grounds . . . by constitutional amendment." *Mazzone*, 432 Mass. at 526-28, 736 N.E.2d at 368-70.

Still, the drafters recognized that the process for amending the Constitution should be careful and deliberative. The requirement for approval by two successive Legislatures ensures that, between

the time an amendment is first proposed and the time it may appear on the ballot, not only several years of time elapse within which the people themselves may deliberate, but also that an election intervenes so that a newly elected Legislature has its say. The drafters included neither (1) any specially expedited procedure for constitutional amendments in response to court decisions, nor (2) any procedure for the suspension of court decisions until a responsive amendment could be approved. *Compare* Mass. Const. amend. art. 48, The Referendum, pt. III, § 3 (providing procedure for voter petition to suspend operation of law passed by Legislature, pending voter referendum on whether to repeal law).

Accordingly, that *Goodridge* took effect on May 17, 2004, and a constitutional amendment to overturn *Goodridge* could not appear on the ballot until November 2006, is precisely in conformance with the plan of the Massachusetts Constitution. The people retain ultimate control over their government and their laws, with all of the safeguards against hasty action that are part not only of the Massachusetts but also the federal Constitution, and indeed are basic to the notion of a written constitution in the first place.[4] Nothing in this system offends

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[4] *See In re Duncan*, 139 U.S. at 461:

> By the constitution, a republican form of government is guaranteed to every state in the Union, and the distinguishing feature of that form is the right of the people to choose their own officers for governmental administration, and pass their own laws in virtue of the legislative power reposed in representative bodies, whose legitimate acts may be said to be those of the people themselves; but, while the people are thus the source of political power, their

against any conception of a republican form of government. As the Court of Appeals concluded: "The resolution of the same-sex marriage issue by the judicial branch of the Massachusetts government, subject to override by the voters through the state constitutional amendment process, does not plausibly constitute a threat to a republican form of government." Pet. App. 18a. "Absent such a threat," the court said, " our federal constitutional system simply does not permit a federal court to intervene in the arrangement of state government under the guise of the Guarantee Clause." *Id.* The correctness of this holding demonstrates that this case presents an insubstantial claim that would be an inappropriate vehicle for consideration of the Guarantee Clause. The petition should accordingly be denied.

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governments, national and state, have been limited by written constitutions, and they have themselves thereby set bounds to their own power, as against the sudden impulses of mere majorities.

Conclusion

For the reasons stated above, the petition for a writ of certiorari should be denied.

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